Supreme Court, U.S.
FILED

No. 011829 JUN 11 2002

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IN THE

Supreme Court of the United States

DELTA AIR LINES, INC.,

Petitioner,

—v.—

PENNY FERRIS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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116 pg

QUESTIONS PRESENTED

1. Whether an employer can be liable under Title VII for sexual harassment based solely on an off-duty personal encounter between two non-supervisory employees that occurs after hours, off-premises, and in a private bedroom?

2. Whether an employer can be liable for sexual harassment solely for not investigating reports about a non-supervisory employee's private sexual conduct in his home and in a private hotel room?

CORPORATE DISCLOSURE STATEMENT

The case caption contains the names of all parties to the proceeding in the Second Circuit Court of Appeals, whose judgment is sought to be reviewed in this matter. Petitioner Delta Air Lines, Inc. does not have a parent corporation. Two Investment Companies hold more than 10% of Delta Air Lines, Inc. stock—PRIMECAP Management Company and Fidelity Management & Research.

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Corporate Disclosure Statement	ii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	2
Statutory Provision Involved	2
Statement	3
Reasons for Granting the Petition	12
Conclusion	21
Appendix A	1a
Appendix B	19a
Appendix C	43a
Appendix D	45a

TABLE OF AUTHORITIES

Cases: PAGE

Alvey v. Rayovac Corp., 922 F. Supp. 1315 (W.D. Wis. 1996). 14, 18

Ambrosio v. Price, 495 F. Supp. 381 (D. Neb. 1979)..... 11, 20

Anderson v. Adam's Mark Hotels & Resorts, 211 F.3d 1277, 2000 WL 390107 (10th Cir. 2000) (table) 13, 14, 17, 18

Capitol City Foods v. Superior Court, 5 Cal.App.4th 1042, 7 Cal.Rptr. 2d 418 (1992)..... 17, 18

Feingold v. Delta Air Lines, et al., No. 99-CV-0728-T (N.D. Tex., Oct. 20, 1999), *aff'd*, No. 01-10209 (5th Cir., May 21, 2002)..... 8

Ganzy v. Allen Christian School, 995 F.Supp. 340 (E.D.N.Y. 1997) 19

Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993) 13

Haybeck v. Prodigy Services Co., 944 F.Supp. 326 (S.D.N.Y. 1996)..... 20

Hennessy v. Penril Datacomm Networks, Inc., 69 F.3d 1344 (7th Cir. 1995) 18

Hirase-Doi v. U.S. West Communications, Inc., 61 F.3d 777 (10th Cir. 1995) 19

PAGE

Hunter v. Countryside Ass'n for the Handicapped, Inc., 723 F.Supp. 1277 (N.D.Ill. 1989) 18

Meritor Savs. Bank v. Vinson, 477 U.S. 57 (1986) 14

Polimeni v. American Airlines, Inc., No. CV 92 5702 (RJD), 1996 WL 743381 (E.D.N.Y. Dec. 18, 1996) 14

Tomka v. Seiler Corp., 66 F.3d 1295 (2nd Cir. 1995) 13

Thorne v. City El Segundo, 726 F.2d 459 (9th Cir. 1983) 20

Statutes:

Title VII of the Civil Rights Act of 1964 42 U.S.C. § 2000e-2 ..... *passim*

28 U.S.C. § 1254 2

28 U.S.C. § 1331 5

28 U.S.C. § 1367 5

N.Y. Corrections Law § 752 20

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PETITION FOR WRIT OF CERTIORARI

Petitioner Delta Air Lines, Inc. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a) is reported at 277 F.3d. 128 (2nd Cir. 2001). The opinion of the United States District Court for the Eastern District of New York (App., *infra*, 19a) is published at 102 F.Supp.2d 132 (E.D.N.Y. 2000).

JURISDICTION

The judgment of the Court of Appeals was entered on December 21, 2001. (App., *infra*, 1a) A petition for rehearing was denied on March 14, 2002. (App., *infra*, 43a) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISION INVOLVED

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a), is the only statutory provision involved in this case. It provides as follows:

§ 2000e-2. *Unlawful employment practices*

(a) Employer practices. It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT

The Second Circuit Court of Appeals has expanded employer liability far beyond the intention and language of Title VII—obliging employers to monitor and investigate the private lives of their employees. The court has held that an employer is legally responsible under Title VII for private sexual conduct that occurs behind a bedroom's closed doors during a purely social encounter between two non-supervisory co-employees. In so ruling, it has placed on employers obligations that, if allowed to stand, will have pernicious consequences for the privacy rights of employees throughout the country.

For the purposes of this proceeding, the facts are well developed and not materially disputed. Delta Flight Attendant Penny Ferris pursued an after-hours social visit with another Delta Flight Attendant, Michael Young in his layover hotel room in Rome, Italy. Ms. Ferris visited Mr. Young's room solely for the purpose of drinking a bottle of wine that they bought together, eating a meal and socializing with him—in essence a date. There was no work related purpose to the visit. The encounter ended in an alleged sexual assault by Mr. Young.

Despite the private and purely social nature of the visit between Ms. Ferris and Mr. Young, the Second Circuit held that Delta could be liable for sexual harassment under Title VII based on the allegation that Ms. Ferris was date raped. In so holding, it issued two unprecedented legal rulings. First, it expanded Ms. Ferris' "work environment" far beyond the sphere contemplated by Title VII and beyond any area over which Delta had any meaningful control. Second, the court triggered Delta's responsibility by ruling that the company was required by Title VII to investigate and somehow correct Mr. Young's possible sexual misconduct during two private,

off-premises and off-duty dates that took place several years before. Both of these holdings are directly contrary to the law in other circuits. Moreover, if the decision stands, employers will be placed in the untenable position of policing the off-duty, off-premises social conduct of their employees in an effort to control their Title VII exposure—even when their employees are on private dates, behind bedroom doors. The impact on employee privacy would be dramatic.

1. *The Basic Facts.* In April 1998, Penny Ferris, a flight attendant for Delta, reported that a male Delta flight attendant had sexually assaulted her during the prior month while she was in a hotel during a layover in Rome, Italy. While she did not name the flight attendant or provide anything close to a complete recitation of the event, she indicated that the incident had occurred when she visited the unnamed flight attendant in his hotel room to share some wine with him. (App., *infra*, 3a-6a, 23a-24a, 48a-52a)

In subsequent meetings with Delta managers, Ms. Ferris provided additional details. She stated that, while she was off-duty and on layover in Rome in March 1998, she decided to visit the hotel room of a fellow flight attendant to drink wine they had purchased at a shop near the hotel. (Id.) She stated that while she was visiting and drinking with this flight attendant, she believed the flight attendant had covertly placed an unknown substance in her wine. According to Ms. Ferris, after she drank one or more glasses, she began feeling tired and eventually passed out in his room. (Id.) She allegedly regained consciousness after she passed out and found the flight attendant having sex with her. Although she was aware of this activity, she stated that she was unable to resist. She eventually became sufficiently aware to get up and return to her hotel room. (Id.)

Ms. Ferris eventually identified the individual as the Defendant Michael Young. Delta took the allegations very seriously and after a thorough investigation, which included repeated interviews with Mr. Young and other flight attendants, the company removed Mr. Young from the workplace. (Id. at 6a) This action was taken against Mr. Young despite substantial information casting doubt on the veracity of Ms. Ferris' allegations.[1]

2. *Plaintiff's Action Below.* Not long after she ceased cooperating in Delta's investigation of her complaint, Ms. Ferris filed a lawsuit asserting a variety of claims against Delta. Pertinent to the present Petition, she stated a claim against Delta under Title VII for creating an unlawful "hostile work environment."[2] (Id. at 2a) During her deposition, however, Ms. Ferris testified to a number of facts that conclusively show that her encounter with Mr. Young occurred outside her work environment—while she was off duty and off Delta's premises.

Ms. Ferris acknowledged that when she entered the hotel in Rome, she was not performing services for Delta, but engaged in a personal pursuit. (Id. at 36a; 48a-49a) She was released from *any* obligations to Delta and was free to engage in *any* activities she chose—including sleeping, consuming alcohol, visiting with friends, and touring the city or the countryside. (Id. at 46a-47a) She was never required by Delta to undertake any work-related activity after being released from duty. She was

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[1] It is worth noting that a trial was held in the District Court solely on the issue of whether Mr. Young raped Ms. Ferris. Nine out of ten jurors concluded that Mr. Young had *not* in fact assaulted Ms. Ferris. (Id. at 22a)

[2] Because Ms. Ferris asserted claims under Title VII, the District Court's jurisdiction was premised on 28 U.S.C. § 1331. The District Court exercised supplemental jurisdiction over Ms. Ferris' state law claims pursuant to 28 U.S.C. § 1367.

not even required to stay in the hotel—and certainly she was not required to visit *Mr. Young's* hotel room, regardless of whether that room was in the crew hotel or elsewhere. (Id.)

Ms. Ferris also fully acknowledged that she *voluntarily* accompanied Mr. Young to his hotel room for *purely personal reasons*—to eat, drink wine and socialize with him. (Id. at 48a-49a) The purely personal choice she made to pursue an acquaintance with Mr. Young, enter his hotel room, and begin drinking wine with him was hers and hers alone: Delta had, and could have had, nothing whatever to do with it.

3. *Alleged Prior Reports.* Despite the purely personal nature of Ms. Ferris' encounter with Mr. Young, Ms. Ferris attempted to hold Delta liable for the alleged assault because, during the previous six years, Delta allegedly had received reports from two other Flight Attendants of inappropriate sexual behavior on dates they had with Mr. Young. Both of the alleged reports involved conduct that occurred in private bedrooms, far removed from the workplace and from any location remotely connected to the workplace. Further, the alleged reports each concerned situations in which Flight Attendants were on purely social visits with Mr. Young in private bedrooms, during which Mr. Young allegedly "went too far" in his sexual advances.

The first alleged report to Delta came from Delta Flight Attendant Kathleen Ballweg, and involved an encounter with Mr. Young that took place in December 1992 while she was visiting Mr. Young and his mother in Florence, Italy. (Id. at 6a, 58a-61a) Ms. Ballweg's encounter with Mr. Young allegedly occurred in a private hotel room, in a bed she was consensually sharing with him. (Id. at 60a-62a) According to Ms. Ballweg, after engaging in some consensual kissing with Mr. Young

in bed, Mr. Young continued beyond the point with which she was comfortable. (Id. at 67a-69a) While she made no attempt to get out of bed, or to resist further advances beyond a single statement that "I don't want to do this," and while Ms. Ballweg did not even believe she had been assaulted until much later, she eventually reported that she had been "attacked" by a fellow flight attendant to an unspecified, unidentifiable person at Delta.[3] (Id.) She did not state that she had been raped or that the "attack" was a sexual one.[4] She refused to file a complaint and she did not ask that the matter be investigated or that Delta do anything about her reports. (Id.)

The second alleged report came from Delta Flight Attendant Aileen Feingold. Ms. Feingold's encounter with Mr. Young took place in the spring of 1995 after a friendship had developed between them. (Id. at 7a-8a, 72a) During a purely social visit to Mr. Young's home in Dallas, Texas (a site far removed from the Delta workplace), Ms. Feingold voluntarily agreed to spend the night with him and went to sleep in his bed. (Id. at 74a) He subsequently joined her and began caressing and fondling her. (Id. at 77a-81a) Ms. Feingold asked

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[3] Ms. Ballweg did not think of her hotel room encounter with Young as a "rape" until much later, when she related the incident to a roommate and the roommate expressed a belief that what had occurred had been a rape. (Id. at 62a-63a) While Ms. Ballweg alleges that she thereafter reported that she had been "attacked," she does not recall to whom she spoke, the person's sex or race, or any other descriptive characteristics.

[4] Ms. Ballweg alleges that she made a second, similar report to another Delta employee after Mr. Young called her on the phone. (Id. at 64a-67a) Again, she cannot name or in any way describe the Delta representative with whom she spoke, but she alleges that she told the second Delta employee that she had previously spoken to someone about a fellow flight attendant who had "attacked" her on a layover (again with no clarifying details or indications the "attack" was sexual), and that he had phoned her in a way that disturbed her. (*Id.*)

Mr. Young "what he thought he was doing," to which he replied, "I'm just playing." (Id.) She responded that this was not a game to her and that she did not want to play. (Id.). When he continued his advances, she said nothing further and made no attempt either to get out of bed or to remove him from it. She made no objections to the sexual relations that followed. (Id.)

Ms. Feingold had no further contact with Young for approximately four months, at which point she initiated both e-mail and telephone communications with him to secure a suitcase she had left for him to have repaired. (Id. at 8a, 75a-76a) When these communications did not result in the return of her suitcase, Ms. Feingold allegedly called a Delta manager, told her about the suitcase and e-mails, and also allegedly accused Young of "attacking and raping" her on a prior visit to his home in Texas. (Id.)[5] She allegedly asked the Delta manager to help her secure the return of her suitcase and to put a note in Young's file so she could assist in case anyone else had a similar experience with him. (Id.) Several years later, she followed plaintiff's lead and belatedly filed her own lawsuit against Delta in Dallas, Texas. That suit was dismissed, largely because of the non-work related nature of the incident. *Feingold v. Delta Air Lines, et al.* No. 99-CV-0728-T (N.D. Tex., Oct. 20, 1999) This decision dismissing her case recently was affirmed by the Fifth Circuit. (No. 01-10209, May 21, 2002).[6]

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[5] Delta submitted that Ms. Feingold made no such report.

[6] Delta also allegedly received a report about Mr. Young, from Delta Flight Attendant Michelle Zachary. The report from Ms. Zachary involved no sexual conduct at all—but instead involved an allegation that Young had twice yelled at her in an "intimidating" fashion (primarily because she was gossiping about him) and said that he was going to "get her" if she continued to talk about him.

4. *Judge Weinstein's Decision.* The Honorable Jack B. Weinstein, sitting in the district court, recognized that, under the facts set forth above, Delta was entitled to summary judgment on Ms. Ferris' hostile work environment claims under Title VII. For two separate reasons, he ruled that Delta could not be held liable based on the events that occurred in Mr. Young's bedroom.

First, Judge Weinstein noted that, "[a]s a general proposition, employers are not responsible under Title VII for hostile sexual acts resulting from non-work-related, off-duty interactions between co-employees." (Id. at 29a) While he recognized that, in a minority of cases (particularly in the context of supervisor/employee interactions), the work environment can extend beyond the traditional work place, this case involved a purely social interaction between two co-employees in a private hotel room—a setting that was too far removed from the workplace to suggest liability:

> In the instant case the environment was not work-related. Plaintiff was not only off-duty, she voluntarily associated with defendant—someone who had no supervisory authority over her—for purely personal reasons. No evidence has been presented linking her decision to go to Defendant's room with her employment with Delta.

(Id. at 36a) Judge Weinstein concluded that to hold an employer like Delta liable for an off-duty, private assault would require employers to begin closely monitoring and controlling their employees' off-duty conduct—something that the drafters of Title VII never envisioned

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Ms. Zachry's alleged report had no sexual overtones or content at all, did not even hint at a sexually hostile work environment. (Id. at 82a)

and that conflicted with fundamental notions of personal privacy. In Judge Weinstein's words:

> To hold an employer liable in these circumstances would be to encourage unacceptable inquisitorial snooping and intrusiveness by employers into the private lives of their employees, contrary to fundamental American notions of privacy.

(Id. at 22a)[7]

Judge Weinstein also recognized a second, independent basis for dismissing Delta from the case, holding that there was no basis on which to conclude that, even if Ms. Ferris had been harassed in the workplace by Mr. Young, Delta should be liable for the assault. Judge Weinstein correctly rejected Ms. Ferris' argument that Delta was on "notice" of prior sexual assaults by Mr. Young because it allegedly had received reports of his conduct with respect to Ms. Ballweg (in a hotel room while visiting his mother's house) and Ms. Feingold (in his own home):

> Plaintiff contends that because Delta might have been aware of two earlier reports of her attacker's off-duty, non-work related improper sexual conduct, it had constructive notice. . . . Although knowledge that a co-worker has allegedly assaulted other persons may in some instances be sufficient to put an employer on constructive notice that a sexual assault is likely to occur, the facts of this case present no material question of constructive notice. Earlier complaints of sexual improprieties involved non-work related, off-duty encounters, substantially

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[7] Judge Weinstein also recognized that Ms. Ferris' minimal contact with Defendant Young in the workplace after the alleged assault was not sufficient to create a hostile work environment under Title VII. (Id. at 38a-39a)

> curtailing both the practical ability and the legal authority of Delta to investigate. *Cf. Ambrosio v. Price*, 495 F. Supp. 381, 386 (D. Neb. 1979) ("An employer cannot be expected to exercise control over the personal, as opposed to business, activities of its employees in order to protect third persons.").

(Id. at 38a) (some citations omitted).

5. *The Second Circuit's Decision.* The Second Circuit Court of Appeals reversed Judge Weinstein's decision. Departing from other state and federal courts that have considered the issue, the court held in its published opinion that, while Ms. Ferris' choice to visit with Mr. Young was purely personal and voluntary, an employer like Delta could be held liable for any conduct that occurred in Mr. Young's bedroom because it was foreseeable that *some* Delta flight attendants would "socialize as a matter of course" while off-duty on layovers, and that some of them *might* choose to enter bedrooms together. (Id. at 12a) In other words, because Delta knew that some of its flight attendants would strike up relationships—and some might even date—the court placed Delta in the position of being required to monitor and regulate their private sexual activity.

The Court also held that Delta's liability in this case could be premised on the allegation that Delta had received reports—from Ms. Ballweg and Ms. Feingold—of private, off-duty sexual acts on dates they had with Mr. Young. According to the Court, these reports of dating misconduct provided Delta with "notice of Young's proclivity to rape co-workers" and thus provided a basis for Title VII liability. (Id. at 14a-16a) The court did not suggest what Delta should or could have done had it investigated the incidents and learned the truth—that the circumstances of the two incidents were unclear and very much a matter of subjective interpretation.

REASONS FOR GRANTING THE PETITION

The Second Circuit's opinion epitomizes the adage that hard cases make bad law, and extremely hard cases make extremely bad law. With not one, but two distinct rulings, the court has dramatically broadened employer responsibilities to employees under federal law. It in essence has required employers to monitor off-duty dates and sexual encounters between employees any time employers know such encounters are likely, and it has declared that employers are responsible under Title VII for ensuring that their employees do not go "too far" during these private dates. Succinctly put, the court's opinion has expanded employers' responsibility, authority, and liability under Title VII into the private bedrooms of employees.

The Second Circuit's first ruling is that an employer may be liable for sexual harassment under Title VII when two non-supervisory employees voluntarily go to a private bedroom after work, for purely social reasons. The sole prerequisite to converting the bedroom to the workplace is the foreseeability of social interaction between fellow employees—a matter as foreseeable as night and day. Second, the Court held that an employer's Title VII liability to an employee for such social interactions can be predicated solely on constructive knowledge of prior allegations of private misconduct that also occurred off-duty, off-premises, behind locked bedroom doors.

These rulings, which purport to be based on an interpretation of a narrow employment discrimination statute, expand employer liability further than ever before and place the Second Circuit squarely in opposition with the other United States Court of Appeals that has addressed the issue. They also run counter to the growing number of statutes and cases that place limits on an employer's

right to monitor, investigate and control an employee's off-duty activities and relationships. Indeed, until now, whether co-employees chose to socialize, and certainly whether they became intimate enough to enter a bedroom together (not to mention what they *did* in that bedroom) have been purely private matters far beyond the reach of the persons' employers and far beyond the scope of Title VII.

1. *The Court of Appeals Decision Dramatically Expands Title VII to Areas and Subjects Unrelated to the Workplace.* For an employer to be found liable for hostile work environment sexual harassment under Title VII, it must engage in misconduct that causes the workplace to be "permeated with discriminatory intimidation, ridicule, and insult . . ." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993). Courts have occasionally recognized that the "work environment" in which unlawful sexual harassment can occur may reach beyond the actual premises of the employer. But, when sexual acts occur away from the work premises, courts also have required an employee to demonstrate a substantial connection between the improper conduct and the employment relationship as a prerequisite to employer liability under Title VII. *See e.g.*, *Anderson v. Adam's Mark Hotels & Resorts*, 211 F.3d 1277, 2000 WL 390107 (10th Cir. 2000) (table); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1306 (2nd Cir. 1995).

Many courts have recognized that unwelcome or hostile sexual acts that occur during off-duty interactions between co-employees are too remote to the employment relationship to implicate Title VII. Because Title VII is aimed at immunizing employees' work environments from sexual intimidation, employers are not liable for unwelcome or hostile sexual acts that occur during off-duty dates, in private quarters, between two co-workers.

Anderson, 2000 WL at *1; *Alvey v. Rayovac Corp.*, 922 F. Supp. 1315, 1330 (W.D. Wis. 1996). Such off-duty, off-premises conduct does not have the requisite connection with the employment relationship to cause employers to be liable. *Id.*

The statutory basis and policy rationale behind this principle is sound. Employers cannot effectively comply with Title VII in the private social world, over which they have no realistic control. Thus, to hold employers liable in that context requires them to override all reasonable notions of employee privacy and to engage in a host of monitoring, investigative and regulatory activities that have no otherwise rational connection to the workplace or the employer's business.

As this Court has made clear in prior precedent, a sexually hostile environment can be created in a variety of ways—from intimate physical contact, to conversations in the workplace, to displays of photos. *See, e.g., Meritor Savs. Bank v. Vinson*, 477 U.S. 57, 67 (1986). *See also Polimeni v. American Airlines, Inc.*, No. CV 92 5702 (RJD), 1996 WL 743381 (E.D.N.Y. Dec. 18, 1996). If the "work environment" includes private bedrooms and hotel rooms, as the Second Circuit now holds, to prevent a Title VII "hostile environment" claim, employers will be obliged to police the private conduct of employees within those areas (including their touching, television viewing, reading, conversations, *etc.*). Employers would, for instance, be expected to discipline employees who watched risqué shows on television while being visited by other employees. Cautious employers would have to prohibit any sexual activity of any kind between employees, including consensual activity by adult employees, to protect against romances and liaisons gone bad and the cross-allegations they frequently spawn. Employees, the general public and the

drafters of Title VII would no doubt find such results to be astounding and an invasion of the right to engage in the most basic private activities. Yet, that is exactly what the Second Circuit's published opinion now requires.

There certainly are state law claims—separate and apart from claims under Title VII—that are available to employees when fellow employees injure them. Such incidents and injuries are what tort and workers' compensation laws are designed to remedy. The Second Circuit decision, however, expands *Title VII* into this field, making it a general tort statute rather than an employment discrimination statute, and applying it to alleged conduct that occurs nowhere near the work environment. In so doing, it turns workplace employment discrimination law on its head.

2. *The Court of Appeals Bases Its Expansion of Title VII On An Employers Knowledge that Its Employees are Likely to Socialize—Knowledge Common to Every Employer Subject to the Act.* The Second Circuit's premise for holding Delta liable for private sexual conduct is its knowledge that its Flight Attendant employees, because they frequently travel, are likely to engage in social interaction. The Court's reasoning, in its entirety, is as follows:

> The flight crew members repeatedly spend brief layovers in a foreign country with little opportunity to develop private lives in that place. Most likely they do not speak the local language. In all likelihood, they do not have family, friends or their own residences there. Although it is not mandatory for them to do so, they generally stay in a block of hotel rooms that the airline reserves for them and pays for. The airline in addition provides them as a group with ground transportation by van from the airport to the hotel on arrival, and back at the time for

> departure. It is likely furthermore in those circumstances that the crew members will have no other acquaintances in this foreign place and will band together for society and socialize as a matter of course in one another's hotel rooms. Even though the employer does not direct its employees as to how to spend their off-duty hours, the circumstances of the employment tend to compel these results.

(App., *infra*, 12a)

Putting aside the fact that most of these factual assertions are conjecture unsupported by the record, the implications of the court's rationale are profound. While the court is certainly correct that some Delta employees may "band together for society and socialize as a matter of course," in this regard Delta employees are no different from employees at any other job. Delta is certainly no different from any other employer who knows that its employees—because of busy work schedules, common commutes, travels away from home, or simply having common interests—will socialize together, and even date one another, when away from work. This knowledge of employee camaraderie, however, has *never* formed the basis for imputing liability to an employer when two non-supervisory co-employees begin socializing together and the relationship goes awry.

If mere knowledge of a "propensity to socialize" is enough, employers face ever-increasing liability (under Title VII, no less) for anything that happens when co-employees are together—no matter where, when or how they socialize with each other. The implications are significant, as employers now are being placed in the untenable position of having to control off-duty social interaction between their employees.

3. *The Court of Appeal's Decision Conflicts With Decisions of other Courts of Appeal and Generally Accepted Limits on Employers' Interests and Responsibilities.* Prior to the Second Circuit's opinion in this case, every court considering this issue has recognized that off-duty, private encounters between co-workers are far outside the working environment and cannot form the basis of a "hostile work environment." In *Anderson v. Adam's Mark Hotels & Resorts*, 211 F.3d 1277, 2000 WL 390107 (10th Cir. 2000) (table), for instance, the plaintiff, who was employed by the Adam's Mark Hotel, alleged that the manager of the hotel's nightclub sexually assaulted her in one of the hotel's rooms that had been provided by the employer to the accused employee. In other words, the alleged assault took place in a hotel room on the employer hotel's premises. The assault occurred after the plaintiff accepted the accused employee's offer to share his hotel room in lieu of driving home following a round of social drinks after work. The court rejected the plaintiff's statutory discrimination claims (as well as her other claims) because the alleged "sexual harassment" occurred outside the workplace, after work hours, in an area where the employer lacked full access. Because plaintiff's *work* environment was not implicated by the off-duty conduct of her fellow employee, she was not able to establish the requisite "hostile work environment." Her Title VII claim therefore was dismissed.

Similarly, in *Capitol City Foods v. Superior Court*, 5 Cal.App.4th 1042, 7 Cal.Rptr. 2d 418 (1992), the California Court of Appeals rejected a statutory sexual harassment claim that was based on the allegation that the plaintiff's supervisor raped her in his home during an after hours date that was arranged while the two were working together. The court noted that the plaintiff had voluntarily accompanied the supervisor to his home, had

not objected to being with him, and had not indicated she had been coerced into accepting his invitation. It further noted that both employees were off-duty at the time, that the conduct had not occurred in the workplace, and that the incident was not work related. Based on those facts, the court held that there was no basis for holding the employer liable for statutory sexual harassment. 5 Cal.App. 4th at 1050, 7 Cal.Rptr.2d at 423. *See also Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344 (7th Cir. 1995) (recognizing that, standing alone, conduct that occurred after plaintiff voluntarily went to a strip bar after work hours could not form the basis for a Title VII claim); *Alvey v. Rayovac Corp.*, 922 F.Supp. 1315, 1330 (W.D. Wisc. 1996) (holding that off-premises, off-duty conduct "has no relevance to plaintiff's workplace environment"); *Hunter v. Countryside Ass'n for the Handicapped, Inc.*, 723 F.Supp. 1277 (N.D.Ill. 1989) (employer not liable under Title VII for an alleged rape committed when employee visited co-worker at his home).

The Second Circuit's extensive opinion does not address, or even attempt to reconcile, any of the cases like *Anderson*, *Capitol City Foods*, or *Hennessy,* or otherwise to legally support its finding that a private bedroom can constitute a "hostile work environment," particularly when two co-employees voluntarily enter it for purposes of socializing and drinking. However, the fact that the Second Circuit did not attempt to reconcile or expound upon its opinion does not render it any less significant to employers.

4. *The Court of Appeals Decision Imposes Upon Employers An Obligation to Inquire Into, Investigate and Regulate the Private Lives of Their Employees and Thereby Substantially Impairs Significant Personal Privacy Rights.* The Second Circuit's second rationale

for its decision underscores the court's requirement that employers necessarily engage in inquisitorial snooping into the private lives of their employees. Specifically, the court ruled that Delta could be held liable for the alleged conduct of Mr. Young in his private hotel room because, during the six year period prior to the encounter, it allegedly had received two reports about his sexual activity during private dates in his home (with Ms. Feingold) and in a private (non-layover) hotel room (with Ms. Ballweg).

The Second Circuit is the first court ever to hold that an employer may be found liable for creating a hostile *work* environment based upon its knowledge of alleged conduct by an employee indisputably *outside* the work environment. There is certainly no prior Title VII holding that in any way obligates an employer to regulate, investigate, and/or penalize an employee for off-duty social behavior, be it sexual or otherwise. To the contrary, courts have held that such liability can be premised only on knowledge of conduct that involves alleged harassment *in the workplace*, in the course and the scope of the accused employee's employment, that is also near in time to the events about which the employee complained. *See, e.g., Hirase-Doi v. U.S. West Communications, Inc.*, 61 F.3d 777, 783-4 (10th Cir. 1995).

The law "generally prevents interference with the privacy of sexual relationships," and only "[r]eligious institutions . . . are provided leeway under federal constitutional and statutory law in regulating the sexual conduct of those in their employ . . . ." *Ganzy v. Allen Christian School*, 995 F.Supp. 340, 359 (E.D.N.Y. 1997) (Weinstein, J.). An employer should not even have the right, much less a court-imposed obligation, to police its employee's constitutionally protected private sexual conduct. *Thorne v. City El Segundo*, 726 F.2d 459, 468 (9th

Cir. 1983). *See also*, *Ambrosio v. Price*, 495 F. Supp. 381, 386 (D. Neb. 1979) ("An employer cannot be expected to exercise control over the personal, as opposed to business, activities of its employees . . . .")[8]

The Second Circuit's ruling that Delta was obligated to investigate unverifiable reports about Mr. Young's off-duty, private sexual conduct is remarkable when considered in light of the privacy implications of such an approach and the express provisions of federal and state law. To impose such a duty on employers would force them to monitor "the most intimate aspects of their [employees'] off-duty lives," which in turn would contravene other laws and public policies that prohibit employers from inquiring into private sexual matters and their employees' off-duty behavior with others. *Haybeck v. Prodigy Services Co.*, 944 F.Supp. 326, 331 (S.D.N.Y. 1996). Title VII does not impose such a duty upon employers, and the Second Circuit's holding that it does—and that employers essentially must employ "social police" like those Henry Ford employed early in

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[8] If employers not only have a right, but also an obligation, to investigate the private sexual conduct of those in their employ, and to refrain from hiring those whoever have engaged in any form of sexual misconduct (e.g., spousal abuse), the obligation would run counter to a variety of express statutory and public policy obligations—including the express laws and policies of New York where this case was heard. It is the express public policy of New York "to encourage the . . . employment of persons previously convicted of one or more criminal offenses." N.Y. Corrections Law § 753. Based on this public policy, the New York legislature has made it *unlawful* (except in narrow circumstances) to deny employment "by reason of being convicted of one or more criminal offenses . . . ." N.Y. Corrections Law § 752. The Second Circuit's proposed expansion of employment discrimination law to impose an obligation on employers not only to investigate peoples' sex lives outside of work, but also to refrain from hiring, or even to terminate, those whose past includes potentially criminal sexual misconduct outside the workplace, would run counter to these express provisions of New York law.

the Twentieth Century to monitor the most private aspects Ford's employees' lives—warrants review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2000

(Argued: January 17, 2001

Decided: December 21, 2001)

Docket No. 00-7921

PENNY FERRIS,

Plaintiff-Appellant,

—v.—

DELTA AIR LINES, INC.,

Defendant-Appellee,

—and—

MICHAEL YOUNG,

Defendant.

Before:

VAN GRAAFEILAND, NEWMAN, and LEVAL,

Circuit Judges.

The plaintiff, a female flight attendant employed by defendant Delta Air Lines, Inc., appeals from summary judgment granted by the United States District Court for the Eastern District of New York (Weinstein, *J.*), dismissing her claims for sexually hostile work environment under federal, New York State, and New York City law, and tort claims under New York State law, all arising from plaintiff's rape during a layover in Rome by a male flight attendant employed by Delta. The Court of Appeals (Leval, *Circuit Judge*) holds that the judgment is (1) vacated, insofar as it dismissed the sexual harassment claims under federal law, and (2) affirmed, insofar as it dismissed the state tort claims.

Affirmed in part, vacated in part, and remanded.

ALLEGRA FISHEL, Beranbaum Menken Ben-Asher & Fishel LLP, New York, NY (John A. Beranbaum on the brief), *for Plaintiff-Appellant.*

GILMORE F. DIEKMANN, Jr., Seyfarth Shaw, San Francisco, CA (Lisa Barnett Sween on the brief), *for Defendant-Appellee.*

LEVAL, *Circuit Judge*:

Plaintiff Penny Ferris, a flight attendant employed by defendant Delta Air Lines ("Delta"), appeals from a grant of summary judgment by the United States District Court for the Eastern District of New York (Weinstein, *J.*), dismissing her claims for (1) sexual harassment under Title VII of the 1964 Civil Rights Act, 42 U.S.C.

§ 2000e, *et seq.*, the New York State Human Rights Law, N.Y. Exec. L. § 290 *et seq.*, and the New York City Human Rights Law, N.Y.C. Admin. Code § 8-107, and (2) numerous other torts under the law of New York, including negligent hiring, retention, and supervision of an employee; assault, battery, false imprisonment, and intentional infliction of emotional distress. The suit arises from a male flight attendant's rape of Ferris during the crew's brief layover between flights in Rome. We vacate the grant of summary judgment as to the federal sexual harassment claims because a reasonable factfinder could find that Delta was responsible for a sexually hostile work environment that caused injury to Ferris. We affirm the grant of summary judgment as to the claims under New York State and New York City law.

BACKGROUND

A. *Events giving rise to this lawsuit.*

In reviewing a grant of summary judgment in favor of the defendant, we are obligated to consider all facts in the light most favorable to the plaintiff. They are as follows:

1. *Young's rape of Ferris*

In March 1998, Penny Ferris and Michael Young, both Delta flight attendants, were employed together on the crew of a Delta flight from New York City to Rome, Italy. When the flight arrived in Rome on March 17, the crew (including Ferris and Young) boarded a Delta bus to be driven to the Savoy Hotel, where Delta had reserved and paid for a block of rooms to be used by the crew until their return flight to New York on March 18. That afternoon, Ferris and Young had shopped together

for wine for Ferris to bring home as a present. Young told her he had brought a bottle of a vintage Ferris was considering and offered to let her taste it in his room when they returned to the hotel. Upon their return, Ferris went to Young's room, where he had a glass of wine ready for her. After drinking about half a glass, Ferris felt faint. She tried to return to her room, but could not make her legs move. She blacked out. While she was unconscious, Young took off her clothes and raped her vaginally, orally, and anally. She partially regained consciousness intermittently during the multiple rapes, at one point telling Young to stop before blacking out again.

That night, at dinner with the other flight attendants, Ferris was in shock and confusion. During the dinner, she began to feel nauseous, and went to the bathroom and vomited. The following day, she flew back to New York, serving as crew together with Young.

On March 30, 1998—about two weeks after the rape—Ferris recounted what had happened to Vanessa Bray, who had been the "On-Board Leader" (the lead flight attendant) on the March 16-18 flights. She told Bray that she thought that she might have been drugged because she was unable to do anything about what was happening to her. Ferris then asked Bray not to repeat what she had said, and Bray did not.

On April 11, 1998—about three weeks after the rape—Ferris reported the rape to Anne Estall, the Delta Duty Supervisor. In the course of a one-hour meeting, Ferris informed her that she had been raped by a flight attendant who was an Italian speaker on a March 1998 flight to Rome. Ferris refused to give Young's name. Using the Delta computer system, Estall narrowed the suspects down to two male, Italian-speaking flight attendants who had been on the March 16-18 flights. She then set up a

meeting between Ferris and Maritza Biscaino, the Delta Base Manager at John F. Kennedy International Airport (JFK) for six days later.

At the meeting on April 17, 1998, Ferris told Biscaino about the rape in an interview that lasted approximately two hours. Biscaino requested a written report and the rapist's name, both of which Ferris refused to give her. In follow-up conversations with Ferris around May 4, 1998, Biscaino eventually persuaded Ferris to disclose her assailant's name.

On May 5, 1998, Biscaino and her co-base-manager Kevin Grimes interviewed Michael Young for approximately two hours. He said that, upon arriving in Rome, he had gone to the gym, returned to his room for a nap, and spent the night with another flight attendant, Jaycee Kantz. The same day, he provided a written statement to this effect. Biscaino interviewed Kantz shortly after, and Kantz confirmed that Young had spent the night with her.

Sometime in early June 1998, flight attendant Carolyn Gordon overheard a conversation between Young and another flight attendant in which Young said that he had been accused of drugging and raping a Delta flight attendant. This prompted Gordon to handwrite a memo to Delta on June 22, 1998, which recounted an experience that Gordon had had with Young in December, 1997. Gordon had accepted Young's invitation to come to his room during a layover in Rome for a glass of wine. When she got there, two glasses of wine were already poured on the nightstand. Gordon's memo implied that the wine Young gave her may have been drugged and that he took advantage of her drugged state to have sex with her, although she acknowledged that she may have suffered an adverse reaction between the wine and antidepressant medications she had been taking.

On June 25, 1998, Ferris gave Biscaino her first written report of the incident. Ferris's written report repeated the events as previously recounted to Vanessa Bray, Estall, and Biscaino. On June 29, 1998, Biscaino and Grimes again met with Young, confronting him with the information in Ferris's written report.[1] At the conclusion of the meeting, Biscaino and Grimes suspended Young and removed his Delta workplace identification. Delta continued to investigate Ferris's claims over the next several months, while Young was on suspension. Young refused to cooperate with the investigation, and was recommended for termination on November 5, 1998. At some point, Young submitted a handwritten resignation to Delta.

2. *Delta's prior notice of Young's sexually abusive conduct with co-workers*

a. *Kathleen Ballweg*

At Christmas time, 1993, Kathleen Ballweg and Young were flight attendants together on a Delta flight from New York to Milan. During the flight, Young invited several flight attendants to accompany him to see the Christmas Eve service in Florence. Several agreed, but changed their minds by the time the plane arrived in Florence, leaving Ballweg as the only flight attendant accompanying Young to Florence. Young raped Ballweg in her hotel room in Florence.

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[1] The written report stated that the rape occurred in the afternoon. Biscaino and Grimes seem to have thought that Ferris had stated that she was raped in the evening, so that Kantz could provide Young with an alibi. However, Ferris was virtually certain that she had told Biscaino in her initial interview that the rape had occurred during the afternoon.

Upon returning to the United States, Ballweg reported the incident to a Delta supervisor at JFK. She said the supervisor should know about somebody who is potentially dangerous, and she identified Young by name. Although she believed she did not use the word "rape," she told the supervisor that she had been attacked, and clearly communicated that the attack was sexual in nature. She told the supervisor that she wanted to be anonymous, and the supervisor replied that Delta could do nothing about it unless Ballweg made a written, formal complaint, which Ballweg did not want to do. Ballweg told the supervisor that she would spread the word about Young's dangerousness, and later warned many flight attendants about Young.

Ballweg later encountered Young during a Delta layover in Frankfurt. Young called Ballweg several times in her hotel room that night, saying she should spend the night with him, and berating her with comments about sex. Ballweg again reported her experiences with Young to a Delta supervisor. She told the supervisor about the attack in Florence, noted that she had already told a supervisor about it, and told the supervisor that she thought that Young was still dangerous.

Ballweg flew with Young only one more time after the phone calls in Frankfurt. Whenever she was flying to Rome or Milan, she would check the flight attendant list to see if Young was on the flight, and tried to avoid assignment to a flight if she saw that Young would be working on it.

Delta took no action in response to Ballweg's reports.

b. *Aileen Feingold*

In March 1995, Delta flight attendant Aileen Feingold visited Young in Dallas for sightseeing. Young had invited her to stay at his house, telling her she would

have a separate bedroom. On the night that Feingold spent at Young's house, Young entered the bedroom where she was sleeping and raped her while she was asleep.

Feingold was so distraught after the rape that she failed a training test that she took the next day. Delta subsequently cancelled one of Feingold's scheduled trips so that she could re-take the test.

Feingold later warned several Delta flight attendants that Young was a rapist. About four months after the rape, Feingold contacted Young about a suitcase that she had left at his house. Young emailed her, telling her that it was her problem to take care of her things, that he had heard that she was talking negatively about him, and that she had better stop because Young had friends that could get her in a lot of trouble, specifically mentioning Delta supervisor Nancy Ruhl, who was manager of in-flight service for JFK. Young also left messages at her home, telling her to shut her mouth, or he would take care of her.

Feingold then contacted Ruhl, the Delta supervisor that Young had mentioned. Feingold told Ruhl about the rape. Feingold also read Ruhl the emails that she had received, and offered to bring her file of Young's emails by Ruhl's office. Ruhl said that that would not be necessary. Feingold said that she believed she was not the first person that Young had raped, as it seemed to her that Young had a method of operation that was down pat. Feingold offered to write up a report to put in Young's file to document her allegations. She told Ruhl that she wanted to do something so that Young would not rape anyone else. Ruhl told Feingold that she would talk to Young and that she would take care of the situation, and that it was not necessary for Feingold to provide a written report.

The next day, Ruhl called Feingold and told her that she had talked to Young, that he would not bother her again, and that she had taken care of everything. She instructed Feingold never to talk to Young, and not to talk to anyone about what had happened.

Delta took no action in response to Feingold's report.

3. *Michelle Zachry*

Michelle Zachry, another Delta flight attendant, had also reported to Delta that Young had behaved hostilely and aggressively toward her during their work on a flight after she refused to go out to dinner with him.

Zachry flew with Young to Rome in July 1997. During the flight, Young made sexual comments to her, told her about his illegal steroid use, told her that he was involved in a sexual affair with another flight attendant, and invited Zachry to go to dinner. Later, Young called Zachry in her hotel room to ask her to go to dinner, and after she turned him down, called her back and became belligerent.

After landing from the return flight from Rome, Young came up to Zachry and began cursing and screaming at her. Passengers turned around to look at him, and another flight attendant eventually interposed himself between Young and Zachry and told Young that he needed to "chill out."

Zachry reported this incident to a supervisor. She did not give Young's name, but told the supervisor that a flight attendant had gone crazy because she would not go out to dinner with him. The supervisor did not ask any questions of her, and did not make a formal report.

In the meantime, Zachry had spoken with the flight attendant that Young had said he was having an affair with. About one week later, Zachry encountered Young on a Delta tram in the Dallas airport. Young called

Zachry obscene names, and threatened to kill her. Zachry feared that Young might physically attack her.

After the incident on the tram, Zachry told Cheryl Merit, a Delta supervisor, that she was going to report an incident. Merit then accompanied Zachry to the office of Kathy Goldberger, a Delta supervisor. This time, Zachry identified Michael Young by name, and told Goldberger what had happened on the plane, on the tram, and how Young had boasted of his illegal steroid use. Goldberger asked Zachry to make a written report, telling her that they could not do anything unless Zachry made a written report, and Goldberger told Zachry that Delta "[did not] have anything on [Young]." Zachry was not willing to make a written report. Afterwards, Zachry would not fly to Rome because of her fear of encountering Michael Young.

Delta took no action in response to Zachry's report.

B. *The district court's decision*

In July 1999, Ferris brought this action against Young and Delta. Judge Weinstein ordered a separate initial trial on the question whether the rape had occurred. This resulted in a mistrial when the jury was unable to agree on a verdict. Delta then moved for summary judgment. The court rejected plaintiff's sexual harassment claims. *See P. v. Delta Air Lines, Inc.*, 102 F. Supp. 2d 132 (E.D.N.Y. 2000) (hereinafter "*P.*"). With respect to the rape itself, the court ruled that Ferris could not prevail because Young's hotel room in Rome was not a "work environment" within the ambit of Title VII. *See id.* at 141. As to the claim based on Ferris's anxiety and distress at the prospect of thereafter encountering Young at Delta, the court concluded that plaintiff's claimed injury was too hypothetical and speculative to support a claim

of hostile work environment harassment. *See id.* at 142-43.

The court also rejected plaintiff's state tort claims. Plaintiff has not sought review of most of these rulings. On the claims for negligent retention and supervision, which plaintiff has pursued on appeal, the district court concluded that Delta could not be held liable for Young's actions because Young was not on Delta's premises or using Delta's chattels when he raped plaintiff. *See id.* at 144.

Judgment was entered on July 20, 2000. On this appeal, Ferris argues the district court erred in granting summary judgment to Delta on her sexual harassment claim and on her claims for negligent supervision and retention of Young.

DISCUSSION

A. *Sexual harassment claims*

1. *Young's rape of Ferris during the layover in Rome*

The district court granted summary judgment to Delta on Ferris's claim based on the rape in Rome. Because Young had no supervisory authority over Ferris and she associated voluntarily with him, and there was no evidence that Delta had affirmatively encouraged flight attendants to visit each other's rooms, the court concluded that the attack in Young's hotel room could not, as a matter of law, be found to have occurred in a "work environment." *See P.*, 102 F. Supp. 2d at 141.

Although we think the question is close, we respectfully disagree with the district court's conclusion. In our view, the rape could be found to have occurred in a work environment within the meaning of Title VII. The cir-

cumstances that surround the lodging of an airline's flight crew during a brief layover in a foreign country in a block of hotel rooms booked and paid for by the employer are very different from those that arise when stationary employees go home at the close of their normal workday. The flight crew members repeatedly spend brief layovers in a foreign country with little opportunity to develop private lives in that place. Most likely they do not speak the local language. In all likelihood, they do not have family, friends, or their own residences there. Although it is not mandatory for them to do so, they generally stay in a block of hotel rooms that the airline reserves for them and pays for. The airline in addition provides them as a group with ground transportation by van from the airport to the hotel on arrival, and back at the time for departure. It is likely furthermore in those circumstances that the crew members will have no other acquaintances in this foreign place and will band together for society and socialize as a matter of course in one another's hotel rooms. Even though the employer does not direct its employees as to how to spend their off-duty hours, the circumstances of the employment tend to compel these results. In view of the special set of circumstances that surround such a foreign layover, we disagree with the district court's conclusion. A jury could properly find on these facts that Young's hotel room was a part of Ferris's work environment within the terms of Title VII.[2]

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[2] We recognize that cases that have found or implied that sexually abusive conduct *committed by supervisors* away from the place of employment can sustain employer liability depend at least in part on a significantly different theory. *See, e.g, Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 748 (1998) (plaintiff's allegations of harassment included an allegation that while she and a supervisor were on a business trip, the supervisor had invited her to the hotel lounge, made remarks about her breasts, and, when she gave no encourage-

The Supreme Court has stated that "whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993). A plaintiff establishes a claim for hostile environment sexual harassment if she demonstrates (1) harassment that was *sufficiently severe or pervasive* to alter the conditions of her employment, creating an abusive working environment, and (2) a sufficient basis for imputing the conduct that created the hostile environment to her employer. *See Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 149 (2d Cir. 1997).

Although a continuing pattern of hostile or abusive behavior is ordinarily required to establish a hostile environment, a single instance can suffice when it is sufficiently egregious. We have no doubt a single incident

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ment to him, told her to "loosen up" and warned her, "I could make your life very hard or very easy at Burlington."); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 60 (1986) (plaintiff's allegations of harassment included allegations that her supervisor had invited her out to dinner and, at the dinner, suggested that they go to a motel and have sexual relations and that her supervisor had made repeated demands upon her for sexual favors, both during and after business hours); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1301-02 (2d Cir. 1995) (plaintiff's allegations of harassment included an allegation that plaintiff had gone out for a "business dinner" with two supervisors and a coworker that consisted of having about 40 drinks and a small quantity of food at a bar, after which the three men raped her in the back seat of a rental car), *abrogated on other grounds by Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *McGuinn-Rowe v. Foster's Daily Democrat*, 1997 WL 669965, at *3 (D.N.H. 1997); *Enders v. Associated Co., Inc.*, 1995 U.S. Dist. LEXIS 14525, at *5 (D. Kan. 1995); *Huitt v. Market St. Hotel Corp.*, 1993 WL 245744 (D. Kan. 1993).

of rape can satisfy the first prong of employer liability under a hostile work environment theory. *See Tomka v. Seiler Corp.*, 66 F.3d 1295, 1305 (2d Cir. 1995) ("[E]ven a single incident of sexual assault sufficiently alters the conditions of the victim's employment and clearly creates an abusive work environment for purposes of Title VII liability."), *abrogated on other grounds by Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

Ferris's evidence must also satisfy the second prong by showing a sufficient basis for imputing responsibility to Delta for Young's conduct. Where the harassment was done by a co-employee without supervisory authority over the plaintiff, liability will be imputed to the employer "only if it is negligent, that is, if it either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it." *Richardson v. New York State Dep't of Corr. Serv.*, 180 F.3d 426, 441 (2d Cir. 1999) (internal quotation marks omitted); *see Faragher v. City of Boca Raton*, 524 U.S. 775, 799 (1998) (noting agreement among the circuits that liability should be imputed to employers in cases of co-worker harassment only if the employer was negligent).

A reasonable factfinder might conclude that Delta's negligence made it responsible for Ferris's rape. Delta had notice of Young's proclivity to rape co-workers. The fact that Young's prior rapes were not of Ferris but of other co-workers is not preclusive. If an employer is on notice of a likelihood that a particular employee's proclivities place other employees at unreasonable risk of rape, the employer does not escape responsibility to warn or protect likely future victims merely because the abusive employee has not previously abused those particular employees.

Supervisory personnel at Delta had been notified that Young had twice raped female co-workers and had

engaged in other abusive, sexually hostile conduct toward the rape victims and a third co-worker. Not only did Delta do nothing about it, but a Delta supervisor (Ruhl) took affirmative steps to prevent the filing of a formal complaint that might have resulted in protective steps and even to prevent a prior victim (Feingold) from informally spreading cautionary words among the flight attendants about Young. Given all the circumstances, a reasonable factfinder could find that Delta was negligent in failing to take steps that might have protected Ferris from Young's proclivity to rape female co-workers.

The district court rejected the proposition that the Ballweg and Feingold rapes could constitute notice to Delta as to the harassment Ferris suffered. It reasoned that the "[e]arlier complaints of sexual improprieties involved non-work-related, off-duty encounters, substantially curtailing both the practical ability and the legal authority of Delta to investigate." *P.*, 102 F. Supp. 2d at 142. We disagree. Had the earlier non-work related incidents consisted of less grave conduct, such as off-duty flirtation, sexual innuendo, or crude talk, we might agree that such off-premises, off-duty conduct does not reasonably give notice of a likelihood that the person will represent a danger to co-employees or import his harassment into a work environment and therefore does not give rise to an employer's duty to protect co-workers. But rape is obviously a far more serious matter. The more egregious the abuse and the more serious the threat of which the employer has notice, the more the employer will be required under a standard of reasonable care to take steps for the protection of likely future victims. The district court may have been correct that Delta's ability to investigate was curtailed by the fact that the Feingold and Ballweg rapes occurred off-duty. It does not follow, however, that the off-duty nature of the rapes absolved

Delta of all responsibility to take reasonable care to protect co-workers, much less justified a supervisor's affirmative steps to prevent a victim from filing a written complaint and warning co-workers.

2. *Ferris's subsequent distress at the prospect of encountering Young at Delta once she was back in New York.*

Because Ferris did not work with Young again after their return to New York, the district court granted summary judgment to Delta with respect to Ferris's fear of further encounters with Young on the ground that "such trepidation, standing alone, is too hypothetical and speculative to support a contention that there was an 'objectively hostile or abusive work environment.' " *P.*, 102 F. Supp. 2d at 142. We think the evidence, viewed in the light most favorable to Ferris, showed that she suffered real emotional trauma from her fear of seeing Young again while both were working as flight attendants. Ferris endeavored to keep abreast of Young's work schedule in efforts to ensure that she would not ever work on a flight he was on. But she suffered anxiety attacks at work due to her fear that she might again encounter Young, sought psychiatric help and took antidepressants. Under the circumstances, we do not think that Ferris's fear of encountering her rapist at her workplace is too hypothetical and speculative to sustain an award of damages. We do not rule out, however, that Ferris may be chargeable with partial, or even full, responsibility for this later injury or its duration by reason of her failure to mitigate her damages when she delayed reporting the event to Delta and naming her assailant.

B. *New York negligent retention and supervision claims*

Ferris originally brought claims against Delta for various intentional torts under the doctrine of respondeat superior, as well as claims for negligent hiring, retention, and supervision. The district court granted summary judgment for Delta on all of Ferris's state tort claims. *See P.*, 102 F. Supp. 2d at 143-44. On appeal, Ferris pursues only her negligent retention and supervision claims.

The district court granted summary judgment for Delta on Ferris's negligent retention and supervision claims on the grounds that employers are only liable for the torts of negligent retention and supervision when the torts are committed on the employer's premises or with the employer's chattels, and that the hotel room in Rome was neither Delta's premises nor its equipment. *P.*, 102 F. Supp. 2d at 143-44.

We affirm the grant of judgment by reason of the New York's Workers' Compensation statute. It provides that: "The right to compensation or benefits under this chapter, shall be the exclusive remedy to an employee . . . when such employee is injured . . . by the negligence or wrong of another in the same employ . . . ." N.Y. Workers' Comp. Law § 29(6) (McKinney 1993 & Supp. 2001), *see also* N.Y. Workers' Comp. Law § 11 (McKinney 1993 & Supp. 2001). We held in *Torres v. Pisano*, 116 F.3d 625 (2d Cir. 1997), that the New York Workers' Compensation Law barred a common law negligence claim that was asserted on the basis of an alleged hostile work environment because of co-worker harassment. *Id.* at 640. Ferris's state common law negligence claims are therefore precluded by the exclusive remedy provisions of New York's Workers' Compensation statute. *See id.*; *see also Ross v. Mitsui Fudosan, Inc.*, 2 F. Supp. 2d 522, 533 (S.D.N.Y. 1998) (dismissing New York common law

negligence claims arising out of sexual harassment lawsuit as barred by exclusive remedy provisions of New York Workers' Compensation Law), *Burlew v. Am. Mut. Ins. Co.*, 472 N.E.2d 682 (N.Y. 1984). We therefore affirm the district court's grant of summary judgment on Ferris's negligent retention and supervision claims.

CONCLUSION

The district court's grant of summary judgment in Delta's favor as to Ferris's federal sexual harassment claims is vacated and the case remanded for further proceedings. The district court's grant of summary judgment in Delta's favor as to Ferris's state law claims for negligent retention and supervision is affirmed. The award of costs and disbursements to Delta is vacated. The costs of the appeal are awarded to Ferris.

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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99 CV 4127
Filed June 29, 2000

P.,

Plaintiff,

—against—

DELTA AIR LINES, INC., and M.,

Defendants.

AMENDED PARTIAL JUDGMENT,
MEMORANDUM AND ORDER

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TABLE OF CONTENTS

I INTRODUCTION 3

II FACTS 4

III STATUTORY SEXUAL HARASSMENT ... 6

A. Law 7

1. Hostile Work Environment..... 8

a. Hostile or Abusive Conduct... 8

b. Work Environment 10

2. Employer Imputed Liability 13

a. Reasonable Avenue of Complaint 15

b. Notice and Response 15

B. Application of Law to Facts 17

1. Sexual Assault in Rome..... 17

2. Flight from Rome 18

3. Fear of Additional Encounters..... 20

IV TORTS..... 21

A. Intentional 21

B. Negligent 22

V CONCLUSION 24

I INTRODUCTION

P. (Plaintiff) sues Delta Airlines, Inc., which employs her as a cabin flight attendant, and M. (Defendant), who was formerly so employed, for rapes Defendant allegedly committed on her while the two were off-duty following a Delta flight to Rome, Italy. She contends that he administered a "date rape" drug and then committed the sexual assaults.

After a mistrial in which a ten member jury split nine to one in favor of defendants on the underlying question of whether a rape had in fact occurred, Delta moves for summary judgment. *See* Fed.R.Civ.P. 56. The motion is granted. To hold an employer liable in these circumstances would be to encourage unacceptable inquisitorial snooping and intrusiveness by employers into the private lives of their employees, contrary to fundamental American notions of privacy.

Both Defendant and Plaintiff are mature; one is approaching forty, the other is almost fifty, and both were previously married. Delta can not be faulted for failure to warn this plaintiff that years before, in private residences far removed in time and place from any Delta related work activities, Defendant may have engaged in non-consensual intercourse with fellow employees, nor that he had sexual relations with a number of female employees between Delta trips to and from Rome (a matter it could not have known about before plaintiff's complaint).

Arguably, if Defendant were a sexual predator who should have been known by his employer to be a danger to females, Delta would have had an obligation to warn her or to decrease the hazards of his sexual rapacity by not providing the pair with adjacent hotel rooms. Arguably, were Plaintiff an immature person requiring special protection and advice, Delta would have had an

obligation to not expose her to this danger or to provide an appropriate chaperon. Arguably, were it mooted about by employees that Defendant was a sexual hazard to be avoided and guarded against, Delta would have had an obligation to prevent the degeneration of work related surroundings by his presence. The evidence supports none of these hypotheses.

II FACTS

Analyzing the evidence to favor Plaintiff's version, *see Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986), this story may be briefly summarized from her point of view.

She was a long time Delta cabin flight attendant assigned to her first flight from J.F.K. International Airport to Rome. He was a cabin flight attendant regularly assigned to Delta's New York-Rome flights. They had neither met nor heard of one another prior to the March 16, 1998 trip to Rome. Neither had supervisory authority over the other.

Upon arriving in Rome on the morning of March 17, Plaintiff and Defendant, together with the rest of the flight crew, were driven in a Delta bus to a hotel where the airline had arranged for the crew to stay until the return flight to New York on March 18. Responding to his offer of some wine, Plaintiff went to his hotel room at about 11 a.m. There he served her wine spiked with a "date rape" drug.

Within a short period Plaintiff fell comatose on his bed, awakening only intermittently, but realizing during these periods of partial consciousness that Defendant was raping her. She was unable to defend herself. After five hours, Plaintiff came-to. She returned to her hotel room where she slept until awakened at 7 p.m. by a telephone call to join crew members for dinner. While dress-

ing for dinner, she found no seminal fluid on her clothes or body, but threw away her undergarments.

During dinner Plaintiff did not discuss the sexual assault. He was not present.

Plaintiff and Defendant both worked aboard the March 18th return flight to New York. Neither then nor upon landing in New York did she report the incident.

Two weeks later, on March 30, 1998, Plaintiff complained about the rape to a fellow flight attendant who had worked as lead attendant on the March 16 and 18 trips to and from Rome, but she asked that the information not be relayed to Delta management; it was not. More than three weeks after the assault, on April 11, 1998, Plaintiff informed a Delta flight attendant supervisor of the assault, but declined to give her attacker's name. A month after the assault she informed a Delta J.F.K. base supervisor that she had been raped, but declined to identify the attacker; in contravention of Delta's printed policy statement requiring immediate reports of sexual harassment, Plaintiff refused a specific request to provide a written statement detailing the event.

Finally, some month and a half after the rape Plaintiff told Delta her attacker's name. Defendant was immediately interviewed by Delta officials. He denied that the incident had taken place and submitted a written statement detailing his actions on March 17.

More than two months after the attack, on June 25, 1998, Plaintiff gave Delta a first written report. Upon receiving it, Delta suspended Defendant without pay. He resigned or was fired a few months later without ever having been permitted to return to work.

Though no evidence appears in Delta's records, it is alleged (and assumed to be true) that the airline knew that some years before: (1) another female flight atten-

dant visited Defendant for the night at his home in Texas where he seduced her; and, (2) yet another female flight attendant slept with him in his family's home in Florence, Italy, where sexual congress ensued without her full consent.

During the trial two other sexual encounters Defendant had engaged in with female flight attendants were revealed—one a fully consensual liaison and the other a repeated voluntary sexual partnership that may have begun by his spiking wine with a "date rape" drug. It is not contended that Delta had any knowledge of either of these affairs prior to the sexual assault on Plaintiff.

III STATUTORY SEXUAL HARASSMENT

Plaintiff asserts claims for unlawful workplace sexual harassment under federal law as well as under New York State and City laws. *See, e.g.*, 42 U.S.C. §§ 2000e, *et seq.*; N.Y. Exec. L. §§ 296.1, 296.6, & 296.7; N.Y.C. Admin. Code § 8-107. For purposes of this motion, New York State and City discrimination laws are assumed to mirror federal law. *See, e.g., Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 565 n.1 (2d Cir. 2000). ("consideration of claims brought under the state and city human rights laws parallels the analysis used in Title VII claims"); *Smith v. Xerox Corp.*, 196 F.3d 358, 363 n.1 (2d Cir. 1999) ("claims under the [New York State Human Rights Law] are analyzed identically to claims under . . . Title VII").

A. Law

Title VII of the Civil Rights Act of 1964 provides in pertinent part:

> [i]t shall be an unlawful employment practice of an employer . . . to . . . discriminate against any indi-

> vidual with respect to . . . conditions, or privileges of employment, because of such individuals . . . sex[.]

42 U.S.C. § 2000e-2(a)(1). "[S]exual harassment in the workplace violates Title VII's broad rule of workplace equality." *Karibian v. Columbia University*, 14 F.3d 773, 777 (2d Cir. 1994) (internal quotation marks omitted); *see Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986). Claims of workplace sexual harassment can be advanced under two theories: (1) quid pro quo, and (2) hostile environment. *See, e.g., Torres v. Pisano*, 116 F.3d 625, 630 (2d Cir. 1997); *Carrero v. New York City Housing Authority*, 890 F.2d 569, 577 (2d Cir. 1989).

Quid pro quo harassment occurs "when 'submission to or rejection of [unwelcome sexual] conduct by an individual is used as the basis for employment decisions affecting such individual.' " *Karibian*, 14 F.3d at 777 (quoting 29 C.F.R. § 1604.11(a)(2)) (changes in original); *see also id.* (prima facie case consists of "evidence that [the plaintiff] was (1) subject to unwelcome sexual conduct, and (2) that her reaction to that conduct was then used as the basis for decisions affecting the compensation, terms, conditions or privileges of employment" (internal quotation marks omitted)). No such harassment is alleged here.

A hostile work environment exists when gender-based "intimidation, ridicule, and insult . . . is *sufficiently severe* or *pervasive* to alter the conditions of the victim's employment and create an abusive working environment." *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 78 (1998); (emphases added). To state an actionable claim, a plaintiff must establish that (1) "the harassment was 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment[,]' " and (2) "that a spe-

cific basis exists for imputing the conduct that created the hostile environment to the employer." *Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 149 (2d Cir. 1997); *see Kotcher v. Rosa and Sullivan Appliance Center, Inc.*, 957 F.2d 59, 63 (2d Cir. 1992).

1. Hostile Work Environment

In order to establish the first element—an abusive work environment—a plaintiff must identify hostile or abusive conduct and establish a connection between that conduct and the work environment.

a. Hostile or Abusive Conduct

Whether unwelcome conduct by a fellow employee "is 'hostile' or 'abusive' depends on the totality of circumstances." *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 767-68 (2d Cir. 1998). A plaintiff must establish both an "objectively hostile work environment, as well as a subjective perception by the plaintiff that the environment was abusive[.]" *Hirase-Doi v. U.S. West Communications, Inc.*, 61 F.3d 777, 782 (10th Cir. 1995); *see Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993). Factors considered include: " 'the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.' " *Quinn*, 159 F.3d at 767-68 (quoting *Harris*, 510 U.S. at 23).

Though this inquiry is not subject to "a mathematically precise test," *Harris*, 510 U.S. at 22, the court of appeals for the Second Circuit has provided benchmarks:

> As a general matter, isolated remarks or occasional episodes of harassment will not merit relief under Title VII; in order to be actionable, the incidents of

> harassment must occur in concert or with a regularity that can reasonably be termed pervasive. However, where the conduct is sufficiently severe, it may alter the plaintiff's conditions of employment without repetition: [E]ven a single incident of sexual assault sufficiently alters the conditions of the victim's employment and clearly creates an abusive work environment for purposes of Title VII liability.

Quinn, 159 F.3d at 768 (internal citations and quotation marks omitted) (change in original). As the Supreme Court has advised, "[t]hese standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a 'general civility code.' " *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998); *see also Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986).

The sexually charged acts constituting a hostile work environment need not be directed at the plaintiff—either in whole or in part—to create a viable claim. *See, e.g., Perry*, 115 F.3d at 151 ("Evidence of the harassment of women other than [plaintiff], if part of a pervasive or continuing pattern of conduct, [is] surely relevant to show the existence of a hostile environment."); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1416-17 (10th Cir. 1987) (quoting approvingly: "Even a woman who was never herself the object of harassment might have a Title VII claim if she were forced to work in an atmosphere where such harassment was pervasive."); *see also Hirase-Doi*, 61 F.3d at 782 n.2; *Drinkwater v. Union Carbide Corp.*, 904 F.2d 853, 863 (3d Cir. 1990); *Leibovitz v. New York City Trans. Auth.*, 4 F.Supp.2d 144, 150-53 (E.D.N.Y. 1998).

In relying on sexual acts directed at others to make out a hostile work environment claim, the plaintiff "may only rely on evidence relating to harassment of which

she was aware during the time that she was allegedly subject to a hostile work environment." *Hirase-Doi*, 61 F.3d at 782. This limitation results from the requirement that the plaintiff must have had a subjective perception that the environment was abusive. A plaintiff who did not know of the sexual acts directed at co-workers during the time in which she claims to have experienced a hostile work environment cannot assert them as a basis for believing her general work environment was so abusive as to effectively alter her working conditions. *See id.*

b. Work Environment

For purposes of stating a hostile work environment claim, the "work environment" in which the abusive and hostile acts can occur reaches beyond the traditional "work place." Nonetheless, when the sexual acts occur outside the work place, the plaintiff must identify sufficient facts from which to infer a connection between the abusive and hostile sexual conduct and the employment. *See, e.g., Tomka v. Seiler Corp.*, 66 F.3d 1295, 1306 (2d Cir. 1995); *Huitt v. Market Street Hotel Corp.*, No. 91-1488-MLB, 1993 WL 245744, at * 5 (D.Kan. June 10, 1993).

Because Title VII is aimed at immunizing employees' work environment from sexual intimidation and repression, employers can avoid liability for unwelcomed or hostile sexual acts resulting from off-duty interactions between co-workers. *See, e.g., Alvey v. Rayovac Corp.*, 922 F.Supp. 1315, 1330 (W.D.Wis. 1996). As a general proposition, employers are not responsible under Title VII for hostile sexual acts resulting from non-work-related, off-duty interactions between co-employees.

Determining whether unwelcome sexual conduct outside the work place is sufficiently work related to fall

within Title VII's reach may be difficult because work relations often blossom into intense personal relationships.

> As the work force grows and people spend more of their time at work, the workplace inevitably becomes fertile ground for the dating and mating game. It is certainly not unusual, and it may even be desirable, for love to bloom in the workplace. Contiguity can lead to sexual interest, which can lead to soft music, candlelight dinners, serious romance, and marriage, or any stops along the way.

Hennessy v. Penril Datacomm Networks, Inc., 69 F.3d 1344, 1353 (7th Cir. 1995) ("[We] should not be in the business of throwing a wet blanket over activities that can lead to consensual amour."); *see also Ganzy v. Allen Christian Sch.*, 995 F.Supp. 340, 350-59 (E.D.N.Y. 1998).

A more difficult—though related—question is: can an actionable Title VII claim for hostile work environment be brought against the employer because the victim of an off-duty non-work-related sexual assault is subsequently forced to work alongside the attacker? The answer is yes. When a violent sexual assault on a co-worker occurs outside of the work environment during the employees' off-duty personal hours, continuing resentment and fear on the job can affect employment "terms, conditions, or privileges[.]" 42 U.S.C. § 2000e-2(a)(1).

Depending on the nature of the off-duty conduct alleged, the employer may face liability for continuing to employ the victim and the attacker in close proximity where the presence of the attacker can reasonably be expected "to alter the conditions of the victim's employment[,]" and the victim in fact experiences such a change. *Harris*, 510 U.S. at 21; *see Faragher v. City of*

Boca Raton, 524 U.S. 775, 787 (1998) ("[A] sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile and abusive, and one that the victim in fact did perceive to be so.").

A contrary conclusion—that an employer is never obligated to mitigate the *work related consequences* of an off-duty, violent sexual assault by one co-worker on another—would have the effect of penalizing the victim by "detract[ing] from job performance" and "discourag[ing] [her] from remaining on the job" because of predictable psychological pressures. *Harris*, 510 U.S. at 22.

To avoid liability for the work-related consequences from off-duty sexual attacks, therefore, an employer must provide a reasonable avenue for complaint. Additionally, once put on notice of the off-duty sexual assault and its consequences to the victim's work environment, the employer must take prompt corrective action. *See infra* Part IV.A.2..

2. Employer Imputed Liability

The second element required for a hostile work environment claim is "a specific basis . . . for imputing the conduct that created the hostile environment to the employer." *Perry*, 115 F.3d at 149; *Tomka*, 66 F.3d at 1305; *Karibian*, 14 F.3d at 780 ("[A] plaintiff seeking to establish harassment under a hostile environment theory must demonstrate some specific basis to hold the employer liable for the misconduct of employees."). Relevant to this inquiry is the status of the employee-harasser; the degree to which employers are held liable for sexual harassment of employees varies depending on whether "the alleged harasser is the plaintiff's supervisor [or] . . . her co-worker." *Karibian*, 14 F.3d at 779.

When a supervisor creates an actionable hostile work environment, the employer is automatically subject to vicarious liability. *Burlington Indus., Inc., v. Ellerth*, 524 U.S. 742, 763 (1998); *Faragher*, 524 U.S. at 807. A "supervisor's power and authority invests his or her harassing conduct with a particular threatening character, and in this sense, a supervisor always is aided" in carrying out the harassment by his employment position. *Burlington Indus.*, 524 U.S. at 765.

> When a fellow employee harasses, the victim can walk away or tell the offender where to go, but it may be difficult to offer such responses to a supervisor, whose "power to supervise—[which may be] to hire and fire, and to set work schedules and pay rates—does not disappear . . . when he chooses to harass through insults and offensive gestures rather than directly with threats or promises of promotion.

Faragher, 524 U.S. at 803. Employers also have "a greater opportunity to guard against misconduct by supervisors"; they can "screen them, train them, and monitor their performance." *Id.* at 803; *see also McKennon v. Nashville Banker Pub. Co.*, 513 U.S. 352, 358 (1995) ("Congress designed the remedial measures in [Title VII] to serve as a 'spur or catalyst' to cause employers 'to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges' of discrimination. Deterrence is one object of these statutes." (internal citations omitted)).

In contrast, where an employee of equal or inferior rank and authority is responsible for the harassment, the employer generally will not be liable unless the employer either (1) provided no reasonable avenue for complaint, or (2) knew of the harassment but did nothing about it. *See, e.g., Perry*, 115 F.3d at 149; *Tomka*, 66

F.3d at 1305; *Karibian*, 14 F.3d at 780; *see also Quinn*, 159 F.3d at 767 ("In contrast to allegations of harassment by co-workers . . . , employers are presumptively liable for all acts of harassment perpetrated by an employee's supervisor." (citing *Burlington Indus.*, 524 U.S. at 765)); *cf.* 29 C.F.R. § 1604.11(d) ("With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer . . . knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.").

a. Reasonable Avenue of Complaint

Whether an employer has provided a reasonable avenue for complaint varies with the structural organization of the company and the resources available to it. Factors to consider include whether: 1) the employer has an anti-harassment policy in place; 2) that policy makes it clear that harassment is strictly prohibited; 3) the policy is seriously enforced; 4) employees are informed how to report sexual harassment; 5) the policy is effectively communicated to employees; and 6) other programs or actions are taken by the employer to eliminate sexual harassment. *See, e.g., Fiscus v. Triumph Group Operations, Inc.*, 24 F.Supp.2d 1229, 1240-41 (D.Kan. 1998); *Duran v. Flagstar Corp.*, 17 F.Supp.2d 1195, 1202 (D.Colo. 1998).

b. Notice and Response

As a general matter, an employer must have actual notice of the hostile work environment before it is required to take remedial action. Nevertheless, the employer is assumed to know what a reasonably astute and concerned employer would have known under the circumstances. *See, e.g., Torres v. Pisano*, 116 F.3d 625,

634 n.9 (2d Cir. 1997) ("An official's actual or constructive knowledge of harassment will be imputed to the employer when principles of agency law so dictate."). Employers will be deemed to have constructive notice of harassment "if officials sufficiently high in the management hierarchy should have gained knowledge of it through the exercise of reasonable care." *Torres*, 116 F.3d at 634 n.9. If a co-worker has knowledge of a harassee's complaint and that co-worker is "charged with substantial responsibility for relaying employee complaints to management, particularly where management is located away from the workplace[,]" the employer may also be deemed to have constructive knowledge of the harassment. *Id.* at 637.

When an employer is aware of evidence of sexual harassment against other employees "that is similar in nature and near in time" to the plaintiff's allegations this too may be sufficient to establish notice. *Hirase-Doi v. U.S. West*, 61 F.3d 777, 784 (10th Cir. 1995). Liability may be imputed to the employer because it "reasonably should have anticipated that the plaintiff would become a victim of sexual harassment in the workplace and yet failed to take action reasonably calculated to prevent such harassment." *Paroline v. Unisys Corp.*, 879 F.2d 100, 107 (4th Cir. 1986), *vacated in part on other grounds*, 900 F.2d 27 (1990) (en banc); *see also Perry*, 115 F.3d at 151 ("Evidence of the harassment of women other than [plaintiff], if part of a pervasive or continuing pattern of conduct, . . . could have been found probative of the company's notice of that environment . . . .").

Once an employer has knowledge of a co-worker's harassing conduct, "the law imposes . . . a 'duty to take reasonable steps to eliminate it.' " *Torres*, 116 F.3d at 636. Though the reasonableness of the employer's

response will necessarily vary based on the underlying allegations of harassment, at a minimum an employer should promptly investigate the allegations and take effective steps to ensure that the conduct does not recur. *Cf. Kotcher v. Rosa and Sullivan Appliance Center, Inc.*, 957 F.2d 59, 63 (2d Cir. 1992) ("[N]ot every response to a complaint [of sexual harassment] should take the form of a discharge[.]").

B. Application of Law to Facts

Plaintiff alleges two encounters with her attacker which serve as the basis for her hostile work environment claims against Delta. The first was the alleged assault in Defendant's Rome hotel room. The second was working with him on the return Delta flight from Rome to New York. Plaintiff alleges no other contact between the two.

1. Sexual Assault in Rome

With respect to Delta's liability for the sexual assault in Rome, the threshold issue is whether Plaintiff's presence in the hotel room was sufficiently related to her employment that the room was effectively a "work environment" falling within Title VII. Inquiries of this nature are inherently fact based, but off-site encounters between employees may be sufficiently related to the employment to constitute a "work environment." *See, e.g, Tomka*, 66 F.3d at 1306.

For example, in *Tomka*, two of the plaintiff's supervisors and one co-worker were alleged to have raped her. The rape occurred immediately after a business dinner attended by the four during which a substantial quantity of alcohol was consumed. *Id.* at 1301-02, 1306. There was a sufficient connection between plaintiff's employment and the assault to raise a material question as to

whether it occurred in a "work environment"; the plaintiff's supervisors may have "used their actual or apparent authority to accomplish the rape." *Id.* at 1306. Relevant though not explicitly addressed was the fact that dinners such as the one which preceded the rape were encouraged by the employer. *See id.* 1301 ("company policy for . . . employees . . . to transact business during these meals").

It is possible that a sexual assault during a flight layover could be found to occur in a "work environment," implicating Title VII liability of the employer. The employees are away from home and together because of their employment.

In the instant case the environment was not work-related. Plaintiff was not only off-duty, she voluntarily associated with defendant—someone who had no supervisory authority over her—for purely personal reasons. No evidence has been presented linking her decision to go to Defendant's room with her employment by Delta.

Had Defendant been a supervisor or had he had supervisory authority, an inference that Plaintiff felt coerced into going to his room might present a fact question of whether the attack occurred in a "work environment." Alternatively, had Plaintiff introduced evidence that Delta had a policy or practice of encouraging flight attendants to commingle in one another's rooms a fact question might exist as to whether the attack took place in a "work environment." No such evidence has been presented.

Also lacking is evidence that Delta was, or could have been, aware that the attacker was a sexually dangerous predator who should not have been placed in close proximity to a fellow employee. *See infra* Part III.B.2.

2. Flight from Rome

During the time Plaintiff was forced to work in close proximity with her attacker on the March 18 flight back to New York, Delta was potentially liable for the *work-related consequences* of the assault. Given the violent and traumatic nature of rapes, it cannot be said as a matter of law that Plaintiff did not experience both an objectively and subjectively "sexually objectionable" work environment during this period, satisfying for purposes of this motion the first element of a hostile work environment claim. *See Faragher*, 524 U.S. at 787; *see also Merritor*, 477 U.S. at 65.

Plaintiff must also establish a basis for imputing liability to Delta for her unease during the flight back—the second element of a hostile work environment claim. *See Kotcher v. Rosa and Sullivan Appliance Center, Inc.*, 957 F.2d 59, 63 (2d Cir. 1992). As earlier noted, where a non-supervising co-worker "is the alleged harasser, an employer will generally not be liable unless the employer either [1] provided no reasonable avenue for complaint or [2] knew of the harassment but did nothing about it." *Tomka*, 66 F.3d at 1305.

With respect to the first prong, Delta provided a reasonable avenue for complaint. It had a comprehensive anti-discrimination policy that covered sexual harassment. Delta informed its employees and supervisors about the policy through training sessions, manuals, posters, memoranda, brochures, and mailings. It took reasonable steps to ensure that employees were aware of the host of reporting options, including availability of the employee's supervisor, any manager in the employee's department, and Delta's Equal Opportunity office. Both Plaintiff and Defendant were aware of the airline's policy and its available reporting procedures at all relevant times.

As to the second prong—that the employer knew of the harassment but did not reasonably take action to prevent it—there is no dispute that at the time of the return flight from Rome Delta was not aware, and could not have known, that a sexual assault had occurred.

Plaintiff contends that because Delta might have been aware of two earlier reports of her attacker's off-duty, non-work related improper sexual conduct, it had constructive notice. *Cf. Hirase-Doi v. U.S. West Communications, Inc.*, 61 F.3d 777, 784 (10th Cir. 1995). Although knowledge that a co-worker has allegedly assaulted other persons may in some instances be sufficient to put an employer on constructive notice that a sexual assault is likely to occur, the facts of this case present no material question of constructive notice. Earlier complaints of sexual improprieties involved non-work related, off-duty encounters, substantially curtailing both the practical ability and the legal authority of Delta to investigate. *Cf. Abrosio v. Price*, 495 F.Supp. 381, 386 (D.Neb. 1979) ("An employer cannot be expected to exercise control over the personal, as opposed to business, activities of its employees in order to protect third persons.").

Having provided reasonable avenues for complaint and having had no notice of the off-duty, non-work related sexual assault, Delta cannot be held liable for any anxiety plaintiff experienced during the flight from Rome.

3. Fear of Additional Encounters

Although Plaintiff concedes that she never worked with or even encountered her attacker after the return flight from Rome, she contends that the continuing possibility and uncertainty of being forced to work with Defendant again (until his suspension) had the effect of sustaining an on-going hostile work environment for

which Delta is responsible. Such trepidation, standing alone, is too hypothetical and speculative to support a contention that there was an "objectively hostile or abusive work environment." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993). This conclusion is supported by the fact that Plaintiff's continuing fear of again encountering her attacker at work was caused by her own delay in identifying him to Delta.

IV TORTS

With respect to state causes of action, the Plaintiff and Delta have consistently asserted that New York law applies; they are deemed to have consented to its application. *See Celle v. Filipino Reporter Enterprises, Inc.*, 209 F.3d 163, 175 (2d Cir. 2000) (implied choice of law).

Plaintiff has asserted claims of assault, battery, false imprisonment and intentional infliction of emotional distress against Delta under the doctrine of respondeat superior. She has also advanced claims for negligent hiring, retention and supervision.

A. Intentional

Under the doctrine of respondeat superior, an employer may be held vicariously liable for a tort "committed by an employee while acting within the scope of his employment." *Tomka*, 66 F.3d at 1317 (citing *Riviello v. Waldron*, 47 N.Y.2d 297, 302 (1979); *Heindel v. Bowery Savings Bank*, 525 N.Y.S.2d 428 (App.Div. 3d Dep't 1988)). "However, an employer is not liable for torts committed by the employee for personal motives unrelated to the furtherance of the employer's business." *Tomka*, 66 F.3d at 1317 (citing *Heindel*, 525 N.Y.S.2d at 428; *Island Assoc. Coop., Inc. v. Hartmann*, 500 N.Y.S.2d 315, 316 (App.Div. 2d Dep't 1986)); *see Judith v. Sisters of Charity Hospital*, 93 N.Y.2d 932, 933 (1999)

("Assuming plaintiff's allegations of sexual abuse are true, it is clear that the employee here departed from his duties for solely personal motives unrelated to the furtherance of the Hospital's business."). An employer is not liable for the unpredictable intentional acts of an employee committed for purely personal reasons.

There is no basis to conclude that the claimed sexual assault was anything other than a purely personal act. As in *Tomka*, this defect is fatal. *See Tomka*, 66 F.3d at 1317; *see also, e.g., Moore v. Sam's Club*, 55 F.Supp.2d 177, 195 (S.D.N.Y. 1999) ("[T]he intentional torts of employees related to sexual misconduct 'arise from personal motives and do not further an employer's business, even when committed within the employment context.' "). Plaintiff cannot, as a matter of law, sustain actions against Delta for assault, battery, false imprisonment, or emotional distress stemming from the assault.

B. Negligent

As to Plaintiff's negligence claims, it is assumed—without deciding—that the New York Workers Compensation Act does not operate to bar employee suits against employers for tortious acts by a fellow employee in a foreign setting arranged by the employer for its benefit. *See* N.Y. Work. Comp. Law § 29(6) (preempting actions against an employer for injuries sustained by an employee in the course of employment).

New York recognizes claims of negligent hiring, retention and supervision against employers for employee's whose conduct causes harm. *See Kenneth R. v. Roman Catholic Diocese*, 654 N.Y.S.2d 791, 795 (App.Div. 2d Dep't 1997) ("In instances where an employee cannot be held vicariously liable for its employee's torts, the employer can still be held liable under theories of neg-

ligent hiring, negligent retention, and negligent supervision.").

With respect to the negligent hiring claim, Plaintiff has produced no evidence that Delta knew or should have known of any hostile sexual acts committed—either in the workplace or elsewhere—by Delta when it hired him. *See Kenneth R.*, 654 N.Y.S.2d at 795. This absence of evidence is fatal to plaintiff's claim for negligent hiring.

The negligent supervision and negligent retention claims also have no merit. An employer does not owe a duty, and is not liable, to persons who are injured by its employees while the employees are off duty, not then acting for the employer's benefit, not on the employer's premises, and not using the employer's equipment. *See, e.g., D'Amico v. Christie*, 71 N.Y.2d 76, 78 (1987) (Kaye, J.) (employer's liability for torts committed by its employees outside the course and scope of their employment "is limited to torts committed by employees on the employer's premises or with the employer's chattels"); *Ross v. Mitsui Fudosan, Inc.*, 2 F.Supp.2d 522, 533 (S.D.N.Y. 1998) (same); *see also Anderson v. Adam's Mark Hotels and Resorts*, No. 99-1100, 2000 WL 390107, at *2 (10th Cir. 2000); *Feingold v. Delta Air Lines, Inc.*, 3:99-cv-0728-T, (N.D.Tex. Oct. 20, 1999) (Maloney, J.) (slip-op); *Ambrosio v. Price*, 495 F.Supp. 381, 386 (D.Neb. 1979) ("An employer owes no duty to persons who are injured by its employees while the employees are off duty and not on the employer's premises.").

There is no dispute that Plaintiff and Defendant were off duty and not acting on Delta's behalf at the time of the assault. *Cf. Rich v. Delta Air Lines, Inc.*, 921 F.Supp. 767, 776-77 (N.D.Ga. 1996). Although Plaintiff and Defendant were staying in hotel rooms paid for by Delta,

the airline neither had control over activities in those rooms, nor did it have access to the rooms. The hotel accommodations cannot be considered the airline's "premises" or "equipment" as support for a claim of negligence against Delta for the assault.

V CONCLUSION

Delta's motion for summary judgment is granted. Costs and disbursements are assessed against Plaintiff.

There being no just reason for delay, entry of a final judgment in favor of Delta is directed. *See* Fed.R.Civ.P. 54(b).

The action against the individual defendant—the alleged attacker—will proceed.

SO ORDERED

/s/ JACK B. WEINSTEIN
JACK B. WEINSTEIN
U.S. Senior District Judge

Dated: Brooklyn, New York
June 28, 2000

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Dkt No: 00-7921
Filed March 14, 2002

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 14th day of March two thousand two.

PENNY FERRIS,

Plaintiff-Appellant,

—v.—

DELTA AIR LINES, INC.,

Defendant-Appellee.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellee Delta Air Lines.

> Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in

regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE, Clerk

By: ARTHUR M. HELLER
Arthur M. Heller,
Administrative Attorney

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

No. 99-CIV4127
(JBW-RLM)

PENNY FERRIS,

Plaintiff,

—vs.—

DELTA AIR LINES, INC., a corporation qualified to do business in California, and MICHAEL YOUNG, an individual,

Defendants.

VIDEOTAPED DEPOSITION OF PENNY FERRIS

November 16, 1999
VOLUME II
(Pages 260-514)

Reported By: Delaine Hall CSR 10164 JN: 1-86067

* * *

[312] Q. While you are on layover you are free to pursue whatever personal business you like consistent with your legal obligations and the commission of violations of Delta policy, correct?

A. What do you mean free? What do you mean by legal?

Q. You can go to—you can go to a nightclub if you want, right?

A. Not all night long.

Q. You're free to go to a nightclub if you [313] wish? Yes?

A. Yes.

Q. You're free to take a trip out in the countryside if you wish as long as you're back when the next flight leaves?

A. You need to let someone know where you're going. The coordinator is usually the one.

Q. You're free to go to a grocery store?

A. Yes.

Q. You're free to take a nap?

A. Yes.

Q. You're free to visit friends in that location if you wish?

A. Leave a number.

Q. You're free to do that?

A. Yes.

Q. So basically your obligation is to make sure people know where to find you if they need to contact you, but otherwise you're free to do whatever you want?

A. No. You're not free to do whatever you want.

Q. You're as free to do whatever you want as you would be if you were in your home in the United States?

[314] A. I don't understand.

Q. Do you have any less degree of freedom on layover than you do when you're at home in your days off?

A. Yes.

Q. In what way?

A. We're still on layover and we're still being paid by the company. We have expense money. We get expense money the minute the plane pushes back.

Q. You get reimbursed for your expenses. That's fine. In what way are you less free to engage in your personal pursuits on layover than you are when you are at home on a day off?

A. Depends on what you're going to do.

Q. In what way are you not free to do something on layover that you are free to do when you're at home on your day off?

A. Can't drink eight hours before a flight.

Q. Can't do that while you're at home either, can you?

A. True.

Q. What can't you do on layover that you can do when you're at home on your days off?

A. Right now I can't think. I am getting tired.

* * *

[320] Q. What conversations did you have with him?

A. I asked him if he could recommend any nice red wine and that's what I—because he's an Italian speaker and flies there all the time.

Q. Did you know that from the flight over?

A. No.

Q. How did you know that he flies to Rome all the time?

A. He's an Italian speaker.

Q. How did you know he flew to Rome all the time?

A. Normally they have to bid it to keep their—I'm not a language speaker, but they need to fly so many months in order to—if they are language-qualified, they need to bid that.

Q. Did you know he was language-qualified?

A. He's one of the Italian speakers.

Q. On the plane?

A. Right.

Q. Did he tell you that, or did you just observe that?

A. Well, I believe he told me that and I think that might be on the rotation.

Q. And so what did he say to you when you asked [321] him to recommend some wine?

A. He said, "why don't you just bring your sandwich over and you can try"—he had in his hand a bottle of wine and it was red. And he said, "you can try this. If you like it, you can go back and buy it." And that was it.

Q. There's a counter in the sandwich shop?

A. Very tall counter.

Q. Do people—from which people eat sandwiches?

A. No.

Q. Drink beverages?

A. Mainly cappuccinos.

Q. But it's a counter where people consume what they buy in the store?

A. You can stand and consume it.

Q. Okay. Did you discuss whether you were going to eat your sandwiches or drink the wine there?

A. Excuse me?

Q. Did you discuss with him whether you were going to eat the sandwiches and drink the wine while you were there?

A. He told me to bring my sandwich, to come over and I can try the wine he's purchasing.

Q. And you assumed—you assumed him to mean [322] to come back to the hotel to drink the wine and eat the sandwiches?

A. Yes.

Q. What other conversations did you have with him in the store?

A. That was it.

Q. Did you say you would do that?

A. I said, "oh, that sounds nice" or something like that.

Q. Did you discuss with him that you were going to be eating the sandwich and consuming the wine in his room?

A. He had said bring over your sandwich to my room.

Q. So you did discuss?

A. To his room, yeah. "Just bring your sandwich. You can try this wine. If you like it, you can go back and try it."

* * *

[454] Q. You did see him on a side view after you woke up?

A. It was like a silhouette.

Q. Could you tell whether—do you have any knowledge based upon the events that took place in the hotel room whether he is hairy or smooth-skinned in his chest, back area?

MS. FISHEL: Both or one at a time?

MR. DIEKMANN: Q. Or either.

A. No.

Q. Do you have any knowledge based upon the events that took place in that hotel room whether he is circumcised or not?

A. No.

Q. Did you see the time of day on a room clock before you left the room?

A. No.

Q. And I assume from your prior testimony you didn't ask him what time it was before you left the room?

A. After I said "I'm leaving," I just left.

Q. As of the time you woke up was the window back open?

A. No.

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Case No. 99 Civ. 4127

PENNY FERRIS,

Plaintiff,

—against—

DELTA AIR LINES, INC., a corporation qualified to do business in California, and MICHAEL YOUNG,

Defendants.

November 22, 1999
9:18 a.m.

Continued Videotaped Deposition of **PENNY FERRIS**, taken by Defendants, pursuant to Notice, at the offices of Seyfarth Shaw Fairweather & Geraldson, Esqs., 1270 Avenue of the Americas, New York, New York, before Phyliss Salimbene, a Registered Professional Reporter and Notary Public within and for the State of New York. (86307)

[618] Q. All right. Now, the first question I have, is: How did you choose Ms. Estall as the individual to whom to make this report?

A. I believe I looked at the photos that are on the wall in our, our crew lounge. And I went in to the, it says operational supervisor, and I went into that area and that's when I met with her.

Q. Was there some reason you choose her as opposed to your normal supervisor?

A. Well, I didn't want to go to a male supervisor.

Q. Was your normal supervisor a male?

A. At the time, yes.

Q. All right. And did you see her in—the memo indicates the conversation took place in the hallway, initially, and then it went into her office, is that correct, is that the way it **[619]** began?

A. I believe I started talking. She was at her desk. And we went into the hallway into another room so it would be private.

Q. Is her desk in the open, in a public area?

A. Yes.

Q. Okay. All right.

What did you say to her to begin the conversation?

A. In so many words, I went over what's in my report, what had happened to me on this rotation, on this trip.

Q. So you explained to her in some detail what had happened?

A. Yes.

Q. Now, in the memo she indicates that you did not give the name of the individual but described the event in some detail, is that an accurate statement on her part? Were you reluctant at this point to mention who it was?

A. I just had told her it was an Italian-speaking male.

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Case No. 99 Civ. 4127

PENNY FERRIS,

Plaintiff,

—against—

DELTA AIR LINES, INC., a corporation qualified to do business in California, and MICHAEL YOUNG,

Defendants.

November 23, 1999
9:36 a.m.

Continued Videotaped Deposition of **PENNY FERRIS**, taken by Defendants, pursuant to Notice, at the offices of Seyfarth Shaw Fairweather & Geraldson, Esqs., 1270 Avenue of the Americas, New York, New York, before Phyliss Salimbene, a Registered Professional Reporter and Notary Public within and for the State of New York. (86308)

[824] person, I just was walking there by myself.

Q. I want to know what you told her in the meeting if it's different than what she says you told her?

A. I believe it's different.

Q. All right. What did you tell her?

A. That I went over to the deli.

Q. Okay.

A. Then, the other thing that's not accurate is the next sentence: Ms. Ferris pointed out after returning from purchasing the wine, she proceeded to the male flight attendant's room. What's inaccurate is that I didn't purchase wine.

Q. Okay. What's the next inaccurate statement?

A. And the next inaccurate statement is the very next sentence, because she puts down that there had been two glasses of wine already poured and there was only one.

Q. Did you tell her in this meeting that two glasses of wine had been poured?

A. No.

Q. You told her that one had been [825] poured, right?

A. Right, when I had already come into the room.

Q. Okay.

A. And then, let's see, the next sentence: Because I had drank approximately half a glass and I remember he filled it up again to make the glass full and so as far as the second glass, I don't believe that's accurate, too, that I said.

Q. You told her that you had finished part of the first glass and he filled it up?

A. Yes.

Q. All right. what else is inaccurate?

By the way, he filled it up out of the bottle?

A. Yes.

And the next sentence is inaccurate. I—I wonder if she really listened.

She—okay. Her words: She remembers being penetrated anally and wanting to struggle to resist but being unable to.

Q. What is inaccurate about that sentence in terms of what you told her?

[826] A. Well, that wasn't the first thing I told her.

Q. She doesn't say it was the first thing you told her.

A. Okay.

MS. FISHEL: Not emotions, just—

THE WITNESS: Oh, okay. Not emotions. I was just trying to—

MS. FISHEL: No, I know you're trying to answer candidly.

THE WITNESS: okay.

A. And. . .

Q. So that sentence is accurate, right?

A. Well, well, that I—okay, she remembers being—and wanting to struggle to resist but being able. . . Those weren't my words.

Q. All right. Let's deal with the first part. Did you tell her—

A. I could—

Q. Let's deal with the first part. Did you tell her that you remembered being penetrated anally in this conversation?

A. I remember saying he did everything to me. And, yes, it was penetration of the anus.

[827] Q. Did you tell her that you wanted to struggle?

A. All I—I didn't say the word, "struggle."

Q. What did you say?

A. I said, how I said no, stop, get out of there and how—

Q. Wait a minute. Did you tell her that you wanted to resist him?

A. But I couldn't move my body.

Q. Did you tell her that you wanted, in this conversation, that you wanted to resist what he was doing?

A. In another sentence prior to this. I said, when I was on my back and he was try—pulling my pants down I tried to move my hand and I couldn't, so I wanted to resist him.

Q. But you didn't tell her you wanted to resist any other actions?

A. I couldn't because I couldn't move my muscles.

* * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Index No.: 99Civ.4127

PENNY FERRIS,

Plaintiff,

—against—

DELTA AIRLINES, a corporation qualified to do business in New York and MICHAEL YOUNG, an individual,

Defendants.

Three New York Plaza
New York, New York
December 16, 1999
9:50 A.M.

EXAMINATION BEFORE TRIAL OF KATHLEEN BALLWEG, the witness herein, taken by the attorneys herein, pursuant to Subpoena, and held before Therese Ferrara, a Notary Public of the State of New York at the above-stated time and place.

* * * *

[21] Q Sounds fun.

A It was okay, because I was enjoying it. It was beautiful. The countryside in Italy is gorgeous.

Q Do you remember any conversations you had with Michael Young in the car or with this man in the car?

A Not really because the way I remember it is they were talking in Italian most of the time. I was just taking in the scenery, enjoying the opportunity to see a little bit more of Italy.

Q What was your understanding of the destination when you arrived in Florence?

A We were going to go right to his mother's house. The man drove us right to Michael's mother's home, which is right across—when you look out her window you could see right into the garden where Dante wrote the Inferno, and the man came in with us and we all had a glass of wine.

The man was very nice. He said good-bye and left. I remember at some point before we even got [22] in the car he had given me his business card, which I no longer have, and I don't remember anything about it.

Q Do you remember anything about what that gentleman looked like that gave you the ride?

A No, I just remember he was older, Italian, a businessman.

Q Do you remember anything about what the car looked like other than it being small?

A No, I'm sorry.

Q So you arrived at Michael Young's mother's house. Did you meet his mother upon your arriving?

A His mother and his aunt were there.

Q Do you remember his mother's name?

A No.

Q Do you remember his aunt's name?

A No.

Q Do you remember what his mother looked like?

A His mother was an attractive lady. She had short hair, nice figure. His aunt was taller than her, dark hair, wore glasses, shawls. She was a bit more flamboyant like than his mother. [23] That's it. They mostly spoke Italian, so it's not like I could really have a conversation with them.

Q Did either of them speak any English?

A His mother spoke some English because I understand Michael's father is American.

Q How did you find out Michael's father was American?

A At some point during a conversation. I don't know if it was on the plane or when we were in Florence or at a dinner or what, because he had an unusual middle name. I asked him how he got his middle name.

Q What was that middle name?

A Buddy.

Q How did he get that middle name?

A The way I remember him telling me is that it was his father's name, or nickname and what I remember, or what I think he said was that his father was a military man and that when he was born his mother gave him that name, so I don't know if it was a nickname or his father's real, given name.

Q Did you meet his father that day?

A No, I didn't. As far as I understood, [24] Michael hasn't seen his father in years.

Q Did Michael Young tell you that?

A Yes.

Q Was it your belief when you were traveling to Florence that you would be staying at Michael Young's mother's house that evening?

A No.

Q Where did you understand you would be staying that evening?

A We had at some point on the plane talked that I would be getting a small Pancione, a room somewhere, and that his mother knew plenty of them. There would be no problems finding one.

Q Did you arrange for the Pancione room or did somebody else?

A His mother did.

Q If you recall, how far was the Pancione from where Michael's mother's house is located?

A I remember Michael walked me over there and it wasn't that far.

* * *

[39] Q Michael Young walked you up to your room?

A Yes.

Q What happened next?

A I went in and I remember turning to say good-night to him and to thank him for a nice evening and he started coming in the room and I was like—you know, "I really want to call it a night. I'm really tired, thank you for a lovely evening." He goes, "Oh no, I can't go back to my mother's house." I said, "Well, you can't stay here", and he goes "Well, I have to stay here", and I said, "Why?", and he goes, "I don't know if my mother's home. I don't have a key."

I mean, it was like a whole list of things, "It's too late to wake her up", and I was like—I said, "But you can't. That isn't my understanding that you could spend the night here", and he goes, "Well, I have to spend the night here. That's all there is to it", and he [40] said, "I have no place to go. I can't walk the streets of Florence", and I was like, "Well, okay", I said.

I suppose for me, after even being with Delta and T.W.A. that little bit of time there comes a kind of an unspoken trust with crew members. You feel like you

kind of know them and I thought he was gay, so I let him in the room.

Q Did you have any discussion of where he was going to sleep when he stayed in the room?

A Well, I don't specifically remember doing it but I think I probably did, so not that I specifically remember, but I can't imagine that I didn't.

Q I don't remember you describing it. Was there any kind of couch or anything that you could sleep on?

A No.

Q Were you planning on having him sleep on the floor?

A No. I have lots of gay friends. I've shared beds with them a lot and traveled with them. It's never been a problem, so I think I just figured well, okay.

[41] Q So at that point when he said, "I can't go back to my house", and you had this conversation you were still under the impression that Michael Young was gay at that point?

A Yes.

Q So you agreed to let him stay in the room that night?

A Yes.

Q Once you both were in the room what happened next?

A I didn't have any pajamas or nightgown or anything with me so while he was in the bathroom doing something, I don't know, whatever, I took my clothes off and I had like a body suit, so I put my body suit on and got under the covers. I was under the covers already when he came out of the bathroom and I remember I was lying on my side facing the wall.

Q Did you talk to him at all as to whether he was going to sleep outside of the covers or under the covers?

A No.

Q What was the next thing that you remember?
[42] A I just remember him getting in the bed turning the light off and just laying really still for a while and it was like—I think I may have said, "Good night, thank you for a nice evening", and then that was it for a while.

Q Did you fall asleep?

A I don't know. I don't remember.

Q What is the next thing you do remember?

A I remember Michael's penis on my back and from that point on it was like being in bed with an octopus. He kept wrestling with me, trying to kiss me, and I remember his—some time during the evening or the flight he had told me that he was a triathlete so he shaved his body and I remember his entire body was covered with stubbles, his legs, his arms, his chest, everything.

Q You said he was like an octopus. Could you describe what you mean by that?

A I was like, "What are you doing? You were just supposed to be spending the night here." I said, "You know, I am not interested in you that way. I thought we were having a nice"—you know, I can't remember the conversation and I

* * *

[187] Q You said when you got home from Milan that you wanted to just get home. Where was your home at the time? Was that New York?

A Yes, it's here in Queens. Well, there in Queens.

Q Did you ever report the incident with Mr. Young in Milan to any police authorities at all?

A No.

Q Why is that?

MS. VAN HERICK: Asked and answered.

Q Why is that?

A All I could think about was getting home and like I said before, I don't think until my commuter roommate and I were talking that it really clearly was in my head that I had been raped and at that time it was the first time that I really kind of stepped back from it and really looked at it and realized that that's what had happened.

Q At least up until that point when your roommate mentioned that to you did you, in your own mind, consider the situation a relatively gray [188] one?

A No.

MS. VAN HERICK: Objection, vague and ambiguous.

A Well, what do you mean by gray?

Q You said several times in your testimony you referred to areas of gray and shades of gray and so basically, in that context.

A In an emotional sense I knew that I had been violated. I had felt trapped but I don't think it was until I really kind of—it's hard to explain. You get a feeling like you have pins and needles in your head. You hear it constantly and at that time all I was thinking about was getting home. I just wanted to get home, get in my own apartment, sit down and that was the first time I could really, really breathe about it and I remember running it over in my mind and thinking how awful it was, but the word rape never entered my mind until my roommate said it.

Q How soon after your return to New York did your roommate first indicate to you an opinion on her part that you had been raped?

A Probably a couple of days because I

* * *

[224] Q What exactly did Mr. Young say to you in the telephone calls that he made to you that night in your hotel room?

MS. VAN HERICK: Asked and answered.

A That I should come and spend the night with him or he should come and spend the night with me. This wasn't all in one conversation. We didn't even have conversations. It was just like hello, why don't you come down here? Michael, I am going to sleep, click. Why are you so frigid? Click. The phone rings again, what's wrong with you? You know, I am a great catch. It was like a series of phone calls, so finally, like I said, I just stopped answering the phone. It was stupid.

Q Was he threatening you in any way?

[225] A No.

Q I get the idea he was persistent—

A He was very persistent.

Q —In his request, but did he in any way attempt to intimidate you or did he get angry over the telephone?

A Well, what he started saying started becoming a little bit more personal. Why are you frigid? It was like sex is good, you know, we would go good together, so that in and of itself is intimidating. It wasn't being intimidating on the phone, just by the nature of what he was saying was disturbing.

Q What made you decide then following that incident to go back to the duty supervisor?

A Because it indicated to me that his behavior hasn't changed.

Q Then you walked up to the duty desk again and you asked to see somebody about something personal?

MS. VAN HERICK: Asked and answered.

Q Was that the way that worked the second time?

A I don't know if I went up to the duty [**226**] desk the second time more comfortable in Kennedy now or just walked back there myself and found a supervisor. I'm not exactly sure at that particular time because I was much more comfortable down there now. As a relatively new flight attendant you're a little bit more timid, so you felt a certain ownership after you have been at a certain place a while.

Q Was this particular supervisor that you spoke with a male or female?

A I don't remember.

MS. VAN HERICK: Asked and answered.

Q You have no details of who the person was or what they looked like at all?

A I don't remember.

Q Is there any way you're able to say here now that it was, in fact, a supervisor with whom you spoke?

A Other than the fact that they were in a supervisor's office, in that whole section everybody that is in those offices are supervisors.

Q What did you say when you walked in?

MS. VAN HERICK: Asked and answered.

[**227**] A I stuck my head in. Sometimes it's just a matter of finding a supervisor. A lot of times they're not there. You walk along and you stick your head in a couple of doors until you find someone or the doors are closed and there is a sign out that says they are in a conference.

I stuck my head in a couple of doors and asked do you have a minute? Could I talk to you about something kind of private? That would have been how I would have started it.

Q Is there any reason, by the way, why you didn't go to your assigned supervisor on either of these two visits?

A No reason in particular, probably just because that's when I got the nerve to do it. Probably you know, thinking about it and saying okay, do it now kind of a thing.

Q Is there any reason why you didn't go to one of the base managers?

A No, I don't think I thought about it that much. I think I just wanted to tell somebody. It may not have been the right judgement or may not have been the wisest way to go about it, but I think I just wanted to talk to **[228]** a supervisor.

Q Have you ever had any difficulty getting along with your own assigned supervisor?

A No.

Q So that would not have been a reason why you didn't go to her or him?

A No, as a matter of fact, for a while there every time I would make an appointment for a supervisor for like a review or whatever you have to do, make an appointment, by the time the day would come along that supervisor was no longer there.

Q Would there be an interim person?

A Then it would be to make the appointment with that person or whatever, so there was a period of time when I had a different supervisor a lot, so a lot of times it's just a matter of getting somebody, you know? I have had a couple of supervisors that I really, really liked. Other than that, it's just the people, you know, you talk to for whatever it is you have to talk to them about.

Q On this second visit you walked in, asked if they had a moment to talk about something **[229]** personal and then what happened? What did you say and what did they say to you?

MS. VAN HERICK: Asked and answered.

A I said briefly that I had come in and spoken about a flight attendant previously that had attacked me on a layover and that he had made a few phone calls. It was disturbing and I just came in to tell them about it, didn't file any paperwork or anything. I just wanted them to know and that something happened and I just had a trip where he was on a layover that happened to be in the same city at the same time and that that night in the hotel he made a few phone calls and they were disturbing.

I just wanted to come back and tell them that apparently, his behavior is still at best, eccentric, and I found it disturbing and I eventually stopped answering the phone in the hotel room which I didn't like to do because if something would have happened and Delta would have needed to get in touch with me I wouldn't have been answering the phone. I just wanted them to know that he was still—I thought he was a spooky guy, a creepy guy, that they should know.

* * *

[245] Q You said the bed in the room was like an American double bed, as far as not being like a single person's bed?

A No, most people have queen size beds now. It was a double bed. It's smaller than a queen and bigger than a double—I mean, bigger that a twin.

Q You said you were wearing a body suit. Would you describe what a body suit and/or what that body suit was?

A It was like a white, stretchy tank top, kind of like a white swim suit.

Q Did it have long arms?

A No, it was like a swim suit. It had a tank top.

Q No legs?

A No.

Q No legs, no arms, just a swim suit type thing?

A Yes, white, stretchy knit.

MR. PERRY: Is it like a leotard?

THE WITNESS: Yes, like a leotard. You wear it underneath your clothes if you're **[246]** cold. It's not appropriate to wear on the beach, but it's shaped like a leotard.

Q Did you have underwear on underneath?

A It was one piece, that was it.

Q When Michael Young came out of the bathroom and got into the bed was he clothed?

A I don't remember. I was facing the wall.

Q How much time expired between the time he got in bed and the time there was any physical contact between you?

A I couldn't say, but I think I was just starting to drift off to sleep.

Q Was there any level of consensual touching, kissing or petting at the beginning?

A I remember he was trying to kiss me. I was like no, Michael, stop it. I remember him putting his arms around me and then kind of, he left me alone and then when I drifted off to sleep he was behind me then.

Q Was there any reciprocal touching or kissing or petting of any kind?

A That's not the way I remember it.

Q Do you recall any conversation with Ms. **[247]** Taylor in which you indicated there was some at the beginning?

A He may have like kissed me, or it just wasn't right and I remember whatever it was that was going on

was stopping. It wasn't like—it was such an awkward situation. He would like try to kiss me and then it kind of became kind of a wrestling match, so he kissed me. I thought maybe if I just kiss him it will stop, but it didn't. It seemed to like escalate, so it really became more of a wrestling match. It wasn't reciprocal at all.

Q There may have been some kissing at the beginning in which there was not a significant level of resistance but then he began to press and you began increasingly to resist?

A I imagine that would be the best way to describe it.

Q Were you touching him in any way in the initial stages?

A Not that I remember.

Q At what point after the initial physical touching started did it get to the point where it started to be a wrestling match?

* * *

[281] Q When you went into the room the first time do you recall whether the individual supervisor asked you whether the assault was sexual in nature?

A What? Say that again.

Q Do you recall whether the individual supervisor you were speaking to asked you when you said that there had been an assault, whether the individual asked you whether the assault was sexual in nature?

MR. DIEKMANN: I think the word she used was attack.

Q Whether the attack was sexual in nature?

A I don't remember them asking me that.

Q The first time you went in did the Delta supervisor you talked to offer you any sort of confidentiality in making the complaint?

A No, but they were answering questions.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

No. 99-CV-4127 (JBW-RLM)

PENNY FERRIS,

Plaintiff,

—vs.—

DELTA AIR LINES, INC., and MICHAEL YOUNG,

Defendants.

ORAL DEPOSITION OF AILEEN (CORI) FEINGOLD

ANSWERS AND DEPOSITION OF AILEEN (CORI) FEINGOLD, a witness produced on behalf of the Plaintiff taken in the above-styled and -numbered cause, on the 30th day of November, 1999, from 1:10 p.m. to 5:31 p.m., before Cynthia Lyn Conyers, a Certified Shorthand Reporter in and for the State of Texas, at the offices of Gillespie, Rozen & Watsky, P.C., located at 3402 Oak Grove Ave., Suite 200, in the City of Dallas, County of Dallas, and State of Texas, in accordance with the Federal Rules of Civil Procedure.

* * *

[155] Q. When you left the restaurant, where did you drive to in his car?

A. To his house.

Q. I assume that you drove from the restaurant to his house in his car?

A. Correct.

Q. And where was his house located? Do you recall the community or place where it was located?

A. I want to say something about Ulysses. I don't know why. I don't know if that's the street he lived on or if that's a city or a suburb. He lived in the suburbs in a little house on a little street. They all look alike to me. I have no good sense of direction.

Q. And was the house one or two stories, if you can recall?

A. One story.

Q. And when the two of you arrived there at his home in his car, did he park in the driveway or did he pull into the garage or what?

A. I recall that he parked on the street in front of the house.

Q. Okay. And I assume he's the one who drove from the restaurant to his house?

A. Yes.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

No. 99-CV-4127 (JBW-RLM)

PENNY FERRIS,

Plaintiff,

—VS.—

DELTA AIR LINES, INC., and MICHAEL YOUNG,

Defendants.

ORAL DEPOSITION OF AILEEN (CORI) FEINGOLD
VOLUME 2

ANSWERS AND DEPOSITION OF AILEEN (CORI) FEINGOLD, a witness produced on behalf of the Plaintiff taken in the above-styled and -numbered cause, on the 1st day of December, 1999, from 9:15 a.m. to 4:50 p.m., before Cynthia Lyn Conyers, a Certified Shorthand Reporter in and for the State of Texas, at the offices of Gillespie, Rozen & Watsky, P.C., located at 3402 Oak Grove Ave., Suite 200, in the City of Dallas, County of Dallas, and State of Texas, in accordance with the Federal Rules of Civil Procedure.

* * *

[191] Q. Notwithstanding the behavior and comments he had made, did you in your own mind, on retiring to go to bed, feel scared or intimidated physically by him?

A. Not physically, no. I didn't—I didn't—I mean, I think I still thought he was gay or whatever. I wasn't afraid of him at that point. I just knew he was not my type of person. You know, he's not the kind of person I would even like to have another coffee with or something.

Q. You just thought he was weird?

A. He's a real weird guy.

Q. Okay. Now—

A. I think I nicknamed him weirdo—and sorry.

Q. In your own mind, you mean, or how?

A. Well, when I tried to get my stuff back from him, I no longer called him by his first or last name. I just called him "weirdo."

[192] Q. By "stuff," you mean your suitcase?

A. Yeah.

Q. Did you go to sleep?

A. Yeah, I went to sleep.

Q. So you went to sleep in his bed alone with your pajamas on, correct?

A. Correct.

Q. Do you know if you had panties on underneath your pajama bottoms?

A. Yes.

Q. Okay. That's customary for you?

A. Yes.

Q. Okay. And—

MR. DIEKMANN: By the way, do I still have my standing objection on all leading questions?

MR. DAVIS: You do.

Q. (BY MR. DAVIS) Did you have trouble getting to sleep that evening, if you recall?

A. I don't recall. I don't usually—I don't recall.

Q. Now, from the time you first went into his bedroom to retire for the evening until the time you actually went to sleep, did Mr. Young ever come into the bedroom to say or do anything?

A. No.

* * *

[221] Q. At some point did you call and talk to Nancy Conn-Ruhl?

A. Well, when I decided not to talk to Michael Young anymore, I called around JFK's—the supervisors' offices and got her personal—her direct number; and I called her up and talked to her about the whole incidence.

Q. Now, why did you call her?

A. Well, there are a couple off reasons. Because he specifically mentioned her as his ally that would get me fired for him if—if ever I double-crossed him or anything like that. And he also—he named her so many times as his good friend; and then I had met the pilot that was her boyfriend that said she didn't want anything to do with him, so I assumed that it's not as friendly as he thought.

And, also, I—he had told me that they worked together in a different capacity; and I wanted her to know, first of all, what he was saying about her **[222]** so that she could know that here is this—you know, you're moving up the ladder and here is this guy using your name to threaten and intimidate other flight attendants.

So I called and I told her about the e-mails that I had, We—we talked for a long time. I told her about the e-mails I had. I told her about going to his house before jet recurrent. I told her that he had attacked and raped

me and that he was manipulating me through her name, and I also told her about the suitcase. I told her that I believed that he was victimize—at the time, I believed this. I don't believe it anymore, but that he was victimizing new flight attendants, those of us that didn't know better, and that part of his whole spiel or his whole—I don't know what you would call it—seduction or—

Q. MO?

A. Yeah, his method of operation. Thank you. His method of operation definitely included using her as his big, you know, supervisor friend that would do anything for him and owed him favors. So I told her everything.

* * *

[321] Q. And what did you see that led you to conclude that he shaved his body hair?

A. A lack of body hair.

Q. Okay. Did you see any tattoos?

A. Yes.

Q. Where?

A. On one of his arms he had something going on. I don't know which arm.

Q. What was it?

A. Right in this area (indicating).

Q. What tattoo was it?

A. I don't know.

Q. What about on his torso?

A. He had his torso covered. I don't know.

Q. Was the vest buttoned?

A. Yes.

MR. PERRY: Just let the record [322] reflect that previously when the witness was asked about the tattoos, she indicated that Mr. Young had a tattoo on his right bicep.

A. Yeah. It was here (indicating). It was his bicep. I don't know if it was his right, but—I can't recall if it was his right or his left.

Q. (BY MR. DIEKMANN) Anything on his left arm?

A. I can't recall. I don't remember. He had one major tattoo on his bicep. 50% chance it was on his left; 50% chance it was on his right.

Q. Just on one, though?

A. That I can remember.

Q. So he—you awaken and he is groping you. What was he doing exactly?

A. He had his hands on me.

Q. On your chest, on your arm, on your—

A. Everywhere. Yes.

Q. What was he doing?

A. He was touching me.

Q. Was he stroking you or just touching you?

A. At some point he put his fingers inside my vagina.

Q. During—at the time you awoke, what was he doing; stroking you or just touching you?

[323] A. He had his hands on me. I do not recall what exactly he was doing. He was violating me.

Q. You knew that he was doing something you didn't want him to?

A. And he knew that he was doing something that I didn't want him to.

Q. Strike the question, please.

Did you know that he was doing something that you didn't want him to do?

MR. DAVIS: Objection, asked and answered.

MR. DIEKMANN: Certainly asked, not answered.

A. Yes—

MR. DAVIS: Yes, it has been.

A. —I knew that.

Q. (BY MR. DIEKMANN) All right. And you screamed?

A. No, I did not scream.

Q. But you did say something to him?

A. Yes.

Q. What did you say?

A. I asked him what he thought he was doing.

Q. Why didn't you say "Stop that"?

A. I probably did. I don't recall all my **[324]** exact words. I recall asking him what he thought he was doing.

Q. What did he say?

A. He said he's just playing.

Q. And then you said, I'm not interested in playing—

A. That's right.

Q. —this game? Then what did you say?

A. I don't recall all my words. I recall those words. Those are the words that I gave you.

Q. Did you at that point make any effort to physically detach him from you?

A. I made as much effort as I felt safe making.

Q. Did you make any physical effort—

A. Yes. I was—

Q. —to remove him from the bed?

A. —squirming from him. I made some effort. And there's some point where you just don't make any effort anymore.

Q. What effort did you make—

MR. DAVIS: One second. You've got to wait until he finishes his whole question. He has to wait until you finish your whole answer. We're having a jumbled record.

[325] Q. (BY MR. DIEKMANN) What effort did you make to remove him from the bed—physical effort did you make to remove him from the bed?

A. I didn't make a physical effort to remove him from the bed.

Q. How long did he continue to fondle or grope you before he penetrated you?

A. Not long.

Q. Well, how long is that? Seconds? Minutes?

A. It was probably minutes. I honestly cannot tell you what the time frame was.

Q. During the time that he continued to fondle or grope you, did you have further conversation with him than the one that we've just discussed?

A. At some point I just stopped talking.

Q. When was that?

A. When I was crying and he wasn't stopping and I realized there was no point.

Q. So at some point while he was still fondling or groping you, you started to cry?

A. Yes.

Q. Did you say anything while you were crying?

A. I don't remember.

Q. And did he say anything when you started crying?

[326] A. No. I mean, nothing about my crying. I don't know what your—

Q. Were you sobbing or were you just weeping, if you know the difference?

A. What is the difference?

Q. Okay. Sobbing would be there was—there were audible sounds coming out of your mouth or—

A. He knew I was crying. It was audible.

Q. Okay. Not just tears?

A. He knew I was crying.

Q. How did he know? Well, that calls for speculation.

How do you know—what makes you say that he knew you were crying in a dark room where you couldn't see him?

MR. GILLESPIE: I'm going to object. She's already answered that. Is there some reason for picking on her?

MR. DIEKMANN: No, she hasn't. She hasn't—

MR. GILLESPIE: She said it was audible; I was crying out loud. He could have heard it. Now, I can hear this stuff.

MR. DAVIS: How do you know it's raining outside, Gil, on a dark night?

[327] MR. GILLESPIE: I don't know why you would be picking on her. She's a Delta employee. She's been through a bad experience, and I would like her to be treated with some respect. At least hear what she says. If this—if there's going to be any area in which you only ask a question once—get an answer and move on—this should be it.

Q. (BY MR. DIEKMANN) How did he know that you were crying?

MR. PERRY: Over my objection, she can answer.

A. He must have heard my patterns of breathing changing. He must have felt tears. He must have known. He had to know. It is not speculation. if I start crying here, you will know even if I turn out the lights.

Q. (BY MR. DIEKMANN) Did he touch or fondle your face in any respect?

A. I don't remember.

Q. You were awake throughout the entire attack?

A. Yes.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

No. 99-CV-4127 (JBW-RLM)

PENNY FERRIS,

Plaintiff,

—VS.—

DELTA AIR LINES, INC., and MICHAEL YOUNG,

Defendants.

ORAL DEPOSITION OF MICHELLE ZACHRY

ANSWERS AND DEPOSITION OF MICHELLE ZACHRY, a witness produced on behalf of the Plaintiff taken in the above-styled and -numbered cause, on the 2nd day of December, 1999, from 12:40 p.m. to 3:55 p.m., before Cynthia Lyn Conyers, a Certified Shorthand Reporter in and for the State of Texas, at the offices of Gillespie, Rozen & Watsky, P.C., located at 3402 Oak Grove Ave., Suite 200, in the City of Dallas, County of Dallas, and State of Texas, in accordance with the Federal Rules of Civil Procedure.

* * *

[139] Q. Did you discuss his sexual comment about "If the wind blows, I get hard"?

A. I don't recall.

Q. Do you recall, if you did, any response made by either Cheryl or Kathy?

MR. STONE: She just said she didn't remember if she did it.

MR. DAVIS: No. I agree with that, Ben, and I agree the question probably is objectionable.

Q. (BY MR. DAVIS) But the only reason I ask it is, as you sit here now, do you remember Kathy or Cheryl making any kind of comment about any sexual comment Michael Young said or made?

A. No.

Q. Was the subject of sexual comments by Young, including ones like "If the wind blows, I get hard," the subject of any discussion there in the meeting you had with Kathy and with Cheryl?

A. No. I don't recall it being a sexual nature in content.

* * *

(2)

Supreme Court, U.S.
FILED
AUG 9 2002
OFFICE OF THE CLERK

No. 01-1829

IN THE

Supreme Court of the United States

DELTA AIR LINES, INC.,

Petitioner,

v.

PENNY FERRIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In this case, the Second Circuit Court of Appeals denied an airline's motion for summary judgement against a flight attendant who brought a lawsuit after she was raped by a fellow flight attendant during an overseas layover. The Court of Appeals held that a reasonable jury could find that a block of hotel rooms, reserved and paid for by the airline could be found to be a work environment within the meaning of Title VII in view of the unique circumstances surrounding foreign layovers, which flight attendants are mandated to take. The Court of Appeals also held that a jury could reasonably find that the airline was responsible for the rape because it was on notice of the perpetrator's "proclivity to rape co-workers."

Should this Court grant *certiorari* to decide whether sexual harassment that takes place in hotel rooms reserved by an employer for their employees occurs in a "work environment" within the ambit of Title VII, where that question turns on the set of circumstances that surround the lodging of an airlines' flight crew during a brief layover in a foreign country? *See.* Pet. App. 11a-14a.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF CITED AUTHORITIES iv

COUNTERSTATEMENT OF THE CASE 1

1. Evidence of The Nexus Between The Layover Hotel Room And Delta's Work Environment 1

2. Delta Had Notice That Young Presented a Serious Threat to the Airline's Female Flight Attendants 2

   A. Kathleen Ballweg 3

   B. Aileen Cori Feingold 5

   C. Michelle Zachry 6

3. Events Giving Rise To This Lawsuit 8

REASONS FOR DENYING THE PETITION 12

1. The Second Circuit Applied Prevailing Title VII Law To The Special Factual Circumstances Involving An Airline Employer 12

Contents

Page

2. The Second Circuit held That The Evidence In This Case Was Sufficient To Impute Responsibility To Delta For Young's Conduct 16

3. The Second Circuit's Decision Is Not In Conflict With Other Circuit Court Decisions Defining The Scope Of Employer Liability For Co-Worker Harassment 18

4. The Second Circuit Did Not Hold That Employers Have a Duty To Monitor The Off-Duty Consensual Activities Of Its Employees. 21

CONCLUSION 27

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES

Aldridge v. State of Kansas, 1997 U.S. Dist. LEXIS 15472 (D. Kansas 1997) 17

Alvey v. Rayovac Corporation, 922 F. Supp. 1315 (W.D. WI 1996) 20

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Armstrong v. Burlington Northern R.R., 139 F.3d 1277 (9th Cir. 1998) 14, 23

Barrett v. Omaha National Bank, 584 F. Supp. 22 (D. Neb. 1983), *aff'd* 726 F. 2d 424 (8th Cir. 1984) 14

Baskerville v. Culligan International Company, 50 F.3d 428 (7th Cir. 1995) 24, 25

Bowers v. Radiological Society of North America, Inc., 101 F. Supp. 2d 691 (N.D. Ill. 2000) 17

EEOC v. Federal Express Corp., 1995 U.S. Dist. LEXIS 22106 (W.D. Washington 1995) 13

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Cited Authorities

Page

Faragher v. City of Boca Raton, 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998) 16, 25, 26

Feingold v. Delta Air Lines, et. al., 1999 U.S. Dist. LEXIS 21962 (N.D. Texas 1999), *aff'd* 2002 U.S. App. LEXIS 11532 (5th Cir. 2002) 6

Finelli v. Southwest Airlines, Co., 2002 U.S. Dist. LEXIS 9755 (N.D. Texas 2002) *adopted* 2002 U.S. Dist. LEXIS 1365 (N.D. Texas 2002) 15

Hennessy v. Penril Datacomm Networks, Inc., 69 F.3d 1344 (7th Cir. 1995) 13, 19

Hirase-Doi v. U.S. West Communications, Inc., 61 F.3d 777 (10th Cir. 1995) 22, 23

Hollins v. Delta Air Lines, Inc., 238 F.3d 1255 (10th Cir. 2001) 22

Huitt v. Market Street Hotel Corp., 1993 U.S. Dist. LEXIS 9665 (D. Kansas 1993) 13

Hunter v. Countryside Association For The Handicapped, Inc., 723 F. Supp. 1277 (E.D. Ill. 1989) 20

Landsgraf v. USI Film Products, 968 F.2d 427, *aff'd* 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994) 25

Cited Authorities

Page

Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986) 13

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Paroline v. Unisys Corporation, 879 F.2d 100 (4th Cir. 1989), *vacated* in part, on different grounds, 900 F.2d 27 (4th Cir. 1990) 22

Pfau v. Reed, 1997 U.S.App. LEXIS 36770 (5th Cir. 1997) 13

Roderick v. New Hampshire Hospital, 2000 U.S. Dist. LEXIS 1143 (D.N.H. 2000) 22

Scottsdale Insurance Company v. Schola-Fassnacht, 2000 U.S. Dist. LEXIS 9030 (E.D. Penn. 2000), *aff'd* 261 F.3d 493 (3d Cir. 2001) 14

Thomas v. Grigorescu, 582 F. Supp. 514 (S.D.N.Y. 1984), *aff'd* 751 F.2d 371 (2d Cir. 1984) 14

Tomka v. Seilor Corporation, 66 F.3d 1295 (2d Cir. 1995) 13

Cited Authorities

Page

STATE CASES

Capitol City Foods, Inc. v. The Superior Court of Sacramento County, 5 Cal. App. 4th 1042, 7 Cal. Rptr. 2d 418 (1992) *review denied*, 1992 Cal. LEXIS 3655 (Cal. Supr. Ct. 1992) 20

Jean Barnes Collection v. Elston, 413 So. 2d 1373 (Fla. Dist. Ct. App. 1982) 14

Pan American World Airways v. Wilmot, 492 So. 2d 1373 (Fla. Dist. Ct. App. 1986) 14

STATUTES

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 ..... *passim*

Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* 14

COUNTERSTATEMENT OF THE CASE

The Court of Appeals for the Second Circuit accurately set forth the facts pertinent to Respondent's claims under Title VII.[1] (Appendix to Delta Air Lines, Inc.'s Petition for Writ of *Certiorari* ("App") 2a-10a). Delta Air Lines, Inc. ("Delta"or "Petitioner") states that the facts contained in the Petition are "materially undisputed." This is not true. The following information is submitted to clarify the record.

1. Evidence of The Nexus Between The Layover Hotel Room and Delta's Work Environment.

Delta argues that flight layovers, and the hotel rooms flight attendants stay in during these layovers, are too far removed from its workplace to fall within the ambit of Title VII. The record below contradicts Delta's argument and demonstrates a strong nexus between the layover hotel room and Delta's work environment.

A significant part of Delta's workforce are its flight attendants who service flights to destinations all over the world. The Federal Aviation Administration mandates that flight attendants who fly a certain number of hours must be provided with a rest period before continuing to service additional flights. A flight attendant on an overseas flight must layover in a foreign city to rest and recuperate before she can work another flight. (Joint Appendix in support of the appeal to the Second Circuit ("JA") A-410-12, A-641-42, A-820: 15-25, A-821:2-11). In accordance with these regulations, Delta reserves and pays for blocks of rooms in hotels in foreign cities for their flight crew to have this

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1. Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2.

opportunity to rest. (App. 12a). Delta also ensures that its flight attendants can easily travel to and from the airport by providing ground transportation. (*Id.*). Although it is not mandatory for flight attendants to stay in the accommodations paid for by Delta, they generally do so because they will "most likely [not] speak the local language" and "in all likelihood do not have family, friends, or their own residences" in these foreign cities. (*Id.*). While staying at layover hotels, it is commonplace for crew members to socialize with each other. "In those circumstances the crew members will have no other acquaintances in this foreign place and will band together for society and socialize as a matter of course in one another's hotel rooms." (App. 12a, JA A-280 p. 323: 12-24, A-646: 4-14, A-895 pp. 75: 13-25, 76: 1-7).[2] As the Second Circuit noted: "Even though the employer does not direct its employees as to how to spend their off-duty hours, the circumstances of the employment tend to compel these results." (App. 12a).

2. Delta Had Notice That Young Presented a Serious Threat To The Airline's Female Flight Attendants.

Delta grossly misrepresents the facts pertaining to the nature of the physical assaults and intimidating harassment

---

2. At her deposition, Ferris was asked how common it was for crew members to visit each other's rooms at a layover hotel:

> It's a frequent thing. It's like a fraternity on the airlines. We all do that. On different layovers we go to other people's rooms. We trust one another. We rely on each other when we're on the aircraft. And sometimes when we're –during layovers we rely on each other too.

(JA A 280 p. 323: 12-24).

by Young against three separate Delta Flight Attendants who reported this conduct to Delta prior to the date on which Ferris was raped. The reason for this is obvious. Petitioner attempts to trivialize the reports received from three Delta Flight Attendants accusing Young, by name, of rape, sexual harassment and threat of physical harm, as well as the anonymous letter received by Delta's Corporate Security office from yet a fourth flight attendant, claiming that he or she was intimidated by Young's conduct,[3] in order to escape liability for the devastating injuries suffered by Ferris at the hands of Young.

A. Kathleen Ballweg

In 1992 or 1993, while on a layover in Milan, Italy, Ballweg joined Young in Florence for a little over a day. (App. 6a). Ballweg spent part of the night in the hotel room with Young. She did so with no intention of engaging in a sexual encounter, as Delta suggests. (Petition p. 6-7). Rather, Young used a ploy to convince Ballweg, who had planned to spend the night alone, to let him stay in her room, and share a bed: He stated it was too late to return to his mother's home in Florence, and that he did not have a key. (JA A-815 pp. 39-40). Despite her reluctance, Ballweg permitted Young to stay in the room with her because she trusted him as a fellow crew member. (JA-815 p. 40: 5-9). There was no "consensual kissing" as Delta alleges (Petition p. 6), nor did Young's actions continue beyond a point with which Ballweg was

---

3. In August, 1997, Delta's Corporate Security Office received another complaint about Young's dangerous conduct from a Delta Flight Attendant who was too afraid of Young to sign his or her name. This unidentified flight attendant wrote that Young regularly purchased steroids abroad and brought them into the United States and that he or she was intimidated by Young because of the attack on Delta Flight Attendant, Michelle Zachery (*infra* p. 7). (JA A-496).

"simply uncomfortable." (Petition, p. 7). Rather, Young raped Ballweg in that bed in the hotel room in Florence, and the Second Circuit understood this attack as such. (App. 6a).

After he raped Ballweg, Young made unwanted sexual overtures, which intimidated and frightened her, back in the layover hotel in Milan and then upon their return to the United States. Once back in the United States, Young tracked down Ballweg's unlisted telephone number and made unwanted and harassing phone calls to her home. (JA A-823-824). Fearful of encountering Young again, in the course of her work for Delta, Ballweg complained to a Delta Duty Supervisor at John F. Kennedy Airport ("JFK"), in New York City ("NYC"). Ballweg *clearly* communicated to this Supervisor that she had been sexually attacked by Young. (App. 7a, JA A-827 p. 86). She also told the Duty Supervisor that she was afraid that Young might use his close proximity to female Delta Flight Attendants while traveling or staying at layover hotels to victimize other flight attendants. Ballweg told the Supervisor that she wanted Delta to put "something on the record" in the event Young attacked another flight attendant. (App. 7a, JA A-827, A-875).[4]

Approximately one year after the rape, Ballweg encountered Young on a layover in Frankfurt. Young called Ballweg several times in her hotel room, asking her to spend

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4. Ballweg stated to the Supervisor:

> I want to give you a heads up because if this is the only incident then its okay, but I think you should know in case something like this comes up again, because then you might know this person is out there . . . I just wanted them to know that I thought he was dangerous potentially. (JA A-827 p. 85: 12-23).

the night with him and "berating her with comments about sex." (App. 7a). For a second time, Ballweg reported Young's sexual attack to a Delta Duty Supervisor. (*Id.*). She told that Supervisor about the attack in Florence and that she was fearful that Young was potentially dangerous to herself and other Delta female flight attendants. (App. 7a, JA A-835, A-868, A-870, A-875).

Despite these two complaints about a serious sexual assault by one Delta Flight Attendant against another, "Delta took no action in response to Ballweg's reports." (App. 7a).

B. Aileen Cori Feingold

In about March of 1995, after Ballweg twice complained to Delta about Young's sexual attack in Florence, Young raped another Delta Flight Attendant, Aileen Cori Feingold ("Feingold"). Feingold was on her way to jet recurrent training in Atlanta, Georgia when she stopped in Dallas, Texas to visit Young. (JA A-761). Feingold and Young had met in the course of working for Delta. Feingold agreed to stay at Young's home on the understanding that she would sleep in a separate bedroom. (App. 7a-8a). That night, after going to sleep alone in that separate bedroom, she awoke to find Young in her bed, naked and physically restraining her. There, Young raped Feingold (JA A-772-774).[5] The Second Circuit recognized that in fact a rape had been committed. (App. 8a).

After Feingold was raped, Young harassed her by leaving intimidating telephone messages at her home, and by sending threatening e-mail messages, using Delta's e-mail system.

5. There was nothing consensual about this act, as Delta insinuates. (*see* App. 79a, (an excerpt of the deposition of Feingold) where Petitioner's counsel, and *not the witness*, repeatedly states that the touching between Young and Feingold included fondling).

(App. 8a, JA A-786, pp. 220-221). Feingold contacted Nancy Ruhl ("Ruhl"), then a Delta Base Manager, based at JFK, and reported that she had been raped by Young and that he was harassing her and threatening her with physical violence. (App. 8a, JA A-757-758, A-786, p. 221: 6-25 A-222-223). Feingold told Ruhl that she wanted to file a formal complaint and that she was afraid of what Young might do to other unsuspecting Delta flight attendants because he had his "method of operation down too pat." (App. 8a, JA A-789 p. 232: 11-19). Ruhl promised to take care of the situation and said it was not necessary for Feingold to file a written complaint. (App. 8a, JA-790-791). The next day Ruhl called Feingold and told her that she had talked to Young. (App. 8a-9a). She stated that Young would not bother her again, and warned her not to talk to anyone about what had happened. (*Id.*).

Despite these complaints about another Delta Flight Attendant being raped by Young, "Delta took no action in response to Feingold's report." (App. 9a).

Feingold filed an action in the United States District Court for the Northern District of Texas, *Feingold v. Delta Air Lines, et. al.*, 1999 U.S. Dist. LEXIS 21962 (N.D. Texas 1999), *aff'd* 2002 U.S. App. LEXIS 11532 (5th Cir. 2002). Feingold did not bring a cause of action under Title VII.

C. Michelle Zachry

Delta would like this Court to overlook Young's threatening conduct toward yet a third Delta Flight Attendant, Michelle Zachry ("Zachry"); conduct which occurred less than one year before Ferris was raped by Young. For some inexplicable reason, the District Court below erred in completely ignoring

the evidence in the record pertaining to Young's harassment of Zachry. (App. 19a-42a). On appeal, the Second Circuit did not. (App. 9a-10a).

Zachry was sexually harassed by Young in 1997 on a Delta airplane on route to Rome, and during a layover after that flight. (App. 9a). Zachry had also been harassed by Young on the airport tarmac, as she was approaching the aircraft.[6] Upon landing in NYC, Young approached Zachry and began cursing and screaming at her.[7] Later in 1997, Young called Zachry obscene names and threatened her with physical harm while both were traveling on a Delta tram. (App. 9a-10a).[8] Zachry complained to Delta management on two occasions about Young's conduct. (App. 9a -10a, JA A-887: ¶¶ 19-21-A-888 ¶¶ 22-24, A-921).

Despite these serious complaints, again "Delta took no action in response to Zachry's report." (App. 10a).

Throughout the rest of Young's employment with Petitioner, Ballweg, Feingold and Zachry remained fearful of encountering him again on future flights they flew for Delta. As a result of this fear, each tried as best they could to check his schedule and avoid flying with him. (App. 7a, 10a,

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6. As both Zachery and Young were walking toward the aircraft, Young said to her: "If the wind blows I get hard." (JA A-886: ¶ 3).

7. His exact words were: "You fucking Dallas girl, you say you are going to do one thing, and you do another, all of you are the same." (JA A-887: ¶ 13).

8. Young yelled in a threatening fashion: "(F)ucking bitch — if I ever hear my name uttered from your lips, I'll hunt you down. I'll get you. I'll find you, you bitch." (JA A-887: ¶ 17).

JA A-824, A-927-928: 4-19). Ballweg warned many Delta Flight Attendants about Young's propensity for violence. (App. 7a). Unfortunately, Ferris was not one of the flight attendants she warned.

3. Events Giving Rise To This Lawsuit.

Although the nature and extent of the sexual assault of Ferris by her co-worker Young in Rome, Italy, is not directly implicated in the legal questions presented to the Court by the present Petition, Delta nonetheless misrepresents significant portions of the record pertaining to the sexual assault. The reasons for doing so are obvious. Petitioner seeks to shift the blame for its own gross negligence by doing absolutely nothing in response to complaints that Young had raped two other Delta Flight Attendants and physically threatened a third onto Ferris herself — in essence to suggest that Ferris is at least partially responsible for being raped. Ferris does not bear part of the responsibility for Delta's failure, because the employer, Delta, had knowledge about Young's rapes of other Delta Flight Attendants. Ferris, on the other hand did not.

Delta's insistence on labeling Ferris's encounter with Young as a "date," not only distorts the true nature of that encounter, but purports to diminish the value that women, as well as men, gain by engaging in social interactions with co-workers they meet in the course of their employment. It is an outdated notion to believe that a working woman, would only socialize with a co-worker in the workplace because she was interested in striking up a consensual sexual relationship with that individual.

Ferris was not on a "date" when she entered Young's room on March 17, 1998 at the Savoy Hotel ("Savoy") in Rome, Italy. Just as Ferris had done on numerous occasions during her thirty year history of flying, she joined a co-worker in a layover hotel room, after working a flight together, without any interest in striking up a romantic liaison. (JAA-76: ¶ 10, A-280 pp. 321- 323, A-532-33: ¶¶ 2-6). Her intention was to go to Young's room briefly to taste some wine he had just purchased, and then to go shopping that afternoon in Rome; perhaps even to purchase some wine to take home. (JA A-280, A-283-284 p. 337: 1-6). Her conduct amply supports her intentions. Ferris went to Young's room, which had been assigned by Delta across the hall from his, without taking a shower, and wearing sweat pants. It was approximately 11:00 *in the morning* (JAA-284 pp. 337-338), and Ferris had been up all night working with Young and the other flight crew (*Id.*).

Moreover, Ferris did not engage in behavior which was so irresponsible so as to depart from any foreseeable conduct that Delta should have anticipated between its co-workers on a layover. In Young's room, Ferris sipped one half glass or less of wine, which had been already poured in a glass before her arrival (App. 4a), *not* more than one glass as Delta suggests. (Petition p. 4). Thereafter, as Ferris has consistently testified, she blacked out and was partially aware of being sexually violated. She never stated as Delta implies that she was simply aware of "sexual activity," (Petition p. 4), suggesting that Young was engaging in consensual sexual activity with her, or that perhaps she was merely tired or wanted to forget some type of half-hearted consensual encounter. Rather "while [Ferris] was unconscious, Young took off her clothes and raped her vaginally, orally, and anally. She partially

regained consciousness intermittently during the multiple rapes, at one point telling Young to stop before blacking out again." (App. 4a).

In the late afternoon, Ferris fully gained consciousness and was able to make her way back to her own room, where she passed out again. (JA A-310 pp. 442-443, A-311-12, A-314, A-533: ¶ 11). While still in shock, Ferris struggled to join the flight crew for dinner that night during which time period she vomited. (App. 4a). Ferris managed to fly back to NYC the next day. Young was also on that flight. (*Id.*).

After her return to the United States, Ferris reported being raped to Delta. Delta goes to some length to portray Ferris as uncooperative during the investigation of her reports about being raped in Rome. Nothing could be further from the truth. Although in her emotionally traumatized state, Ferris was initially reluctant to name Young, she did inform a Duty Supervisor as early as April 11, 1998 — only three weeks after the rape — that her assailant was the only male Italian speaker aboard the March 16, 1998 flight. (JA A-332, A-362, A-693-95). That Supervisor could have pulled up information about that flight from Delta's computer data base and identified Young within minutes. (App. 4a). Ferris also provided detailed information about the rape to Base Manager Maritza Biscaino ("Biscaino") on April 17, 1998. (App. 5a). However, Delta refused to take any steps in response to Ferris's reports until after she formally named Young as her assailant, on or about May 4, 1998. (*Id.*).

JFK Base Managers, Biscaino and Kevin Grimes ("Grimes") met with Young on May 5, 1998. Although Grimes felt that Young was not forthcoming, was nervous

and that his responses were evasive and inconsistent (JA A-475, A-632-38), Young was nonetheless permitted to leave the meeting and return to work leaving large numbers of female flight attendants vulnerable for almost two months more, until Young was eventually suspended on June 29, 1998. (App. 5a-6a). That suspension took place only *after* Ferris filed a formal written report with Delta, and *after* another Delta Flight Attendant, Carolyn Gordon, came forward with a similar account that she too had been subjected to unwanted sex with Young after being drugged. (App. 5a-6a).

Delta never made attempts to verify Young's whereabouts in Rome during the afternoon of March 17, 1998 (JA A-568-570); despite Young's conflicting stories: Young said during the initial interview with Biscaino and Grimes that he was with a pharmacist friend that afternoon (JA A-566: 15-22, A-635). Later in a written statement, Young said he was at a gym in Rome for several hours during that afternoon. (App. 5a).[9]

Delta did not keep Ferris informed about the outcome of any efforts to investigate her case. Even after the airline suspended Young in June of 1998, and after he resigned in December of 1998, Delta never informed Ferris that Young had been suspended and that she would not encounter him again on any transatlantic flight or at JFK airport, leaving Respondent with a great deal of uncertainty about her safety in Delta's workplace. (JA A-226-227). It was only after all the above actions, and after Delta demanded further

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9. Delta spent considerable time interviewing Young's evening-time alibi, Jaycee Kantz, a patently misguided effort because there was never any doubt that Ferris had informed Delta that the assault had taken place in the afternoon. (App. 6a n.1).

written reports (although these reports were superfluous), that Respondent became frustrated and took legal action against Delta. (JA A-179-180: ¶ 26).[10]

REASONS FOR DENYING THE PETITION

This Petition should be denied. While Delta is understandably dissatisfied with the Second Circuit's decision, that court neither "dramatically" broadened employer liability under Title VII cases for co-worker harassment, nor deviated from well-established principles dictating standards of proof for employer liability.

1. The Second Circuit Applied Prevailing Title VII Law to The Special Factual Circumstances Involving an Airline Employer.

The Second Circuit correctly held that Ferris could establish a claim for a hostile work environment under Title VII because the rape, which occurred in Young's hotel room at the Savoy in Rome, was sufficiently connected to Delta's workplace. (App. 12a).

The Second Circuit correctly defined Delta's work environment to include those locations that the airline could reasonably foresee that its flight attendants would congregate in. The fact that the layover hotel, and Young's room, were not under the direct supervision of Delta's management,

10. Although Delta denies that it has any liability for Young's sexual attack of Ferris, it has vigorously defended the adequacy of its investigation of that incident throughout this litigation. Its positions are clearly inconsistent: Delta does not believe that it had any responsibility for the rape of Ferris, because the assault took place outside of its work environment, and yet it argues that its investigation met standards set by Title VII for responding to allegations about workplace harassment.

and that both Young and Ferris were off-duty at the time of the rape does not preclude Ferris's claim from being recognized under pre-existing Title VII law.

This Court acknowledged in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986), that both on site and off-duty incidents of sexual harassment may form the basis of an employee's sexual harassment claim. *Id.* at 60-61, 106 S. Ct. at 2402-03. The Second Circuit's application of the law to the facts of this case are fully consistent with the *Meritor* decision and with other lower court decisions. In those cases, an analysis of employer liability is not limited merely to events which take place on the actual physical premises of the employer, but rather by the court's examination of whether there is an evidentiary nexus between the off-site sexual harassment and the workplace. *See*, e.g., *Pfau v. Reed*, 1997 U.S. App. LEXIS 36770 * 12-13 (5th Cir. 1997) (hostile work environment, sexual harassment claims need not be confined to working hours to affect a term and condition of employment); *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F. 3d 1344, 1353 (7th Cir. 1995) (co-worker's actions directed toward plaintiff at a striptease bar and at a lounge, both off-site and after work hours were actionable); *Tomka v. Seilor Corporation*, 66 F. 3d 1295, 1317 (2d Cir. 1995) (off-duty rape by supervisors and co-worker actionable under Title VII: employer could have been liable under a negligence theory for off-duty rape of employee had there been prior reports of sexual assaults or misconduct); *EEOC v. Federal Express Corp.*, 1995 U.S. Dist. LEXIS 22106 * 5 (W.D. Washington 1995) (employer is liable for off-site sexual harassment of one of its employees by a customer because couriers' duties take them onto the premises of FedEx customers); *Huitt v. Market Street Hotel Corp.*, 1993 U.S. Dist. LEXIS 9665 *

14 (D. Kansas 1993) (after hours sexual harassment may be actionable where there are sufficient facts from which to infer a nexus between the sexual conduct and the work environment); *Barrett v. Omaha National Bank*, 584 F. Supp. 22, 29 (D. Neb. 1983), *aff'd* 726 F. 2d 424 (8th Cir. 1984) (off-duty sexual harassment by co-workers, stemming from social encounters while attending a business conference, was work-related and therefore actionable under Title VII).[11]

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11. Under related employee protection statutes, numerous courts have ruled that employees who are sexually harassed or assaulted when off-duty sustain injuries which arise out of and in the course of their employment: **Federal Employer's Liability Act**: *Armstrong v. Burlington Northern R.R.*, 139 F. 3d 1277, 1280 (9th Cir. 1998) (employee may bring action under FELA where assaulted by co-worker during layover in a hotel room provided by railroad); *Empey v. Grand Trunk Western R.R.*, 869 F. 2d 293, 295 (6th Cir. 1989) (employee who is injured while he avails himself of housing which employer has implicitly encouraged him to use was acting within the scope of his employment); *Thomas v. Grigorescu*, 582 F. Supp. 514, 516 (S.D.N.Y. 1984) *aff'd*, 751 F. 2d 371 (2d Cir. 1984) (employee's injury suffered while traveling to and from hotel accommodations provided by employer arose in the course of his employment since employer encouraged its employees to stay at the hotel during layovers); **State Workers' Compensation laws**: *Pan American World Airways v. Wilmot*, 492 So. 2d 1373, 1374 (Fla. Dist. Ct. App. 1986) (flight attendant's injury which occurred during social dinner while on a layover occurred within the scope of her employment); *Jean Barnes Collection v. Elston*, 413 So. 2d 797, 798 (Fla. Dist. Ct. App. 1982) (claimant could bring workers' compensation claim for a rape which occurred in a hotel room because she was acting within the scope of her employment even for the time period when she stayed in her hotel room during a business training); **Insurance Policy Exclusions**: *Scottsdale Insurance Company v. Schola-Fassnacht*, 2000 U.S. Dist. LEXIS 9030 * 8-10 (E.D. Penn., 2000), *aff'd*, without published opinion, 261 F. 3d 493 (3rd Cir. 2001). (Co-worker

(Cont'd)

A recent decision in the Fifth Circuit, subsequent to the Second Circuit's ruling, demonstrates that the Second Circuit's decision is in accordance with Title VII law. *Finelli v. Southwest Airlines Co., 2002 U.S. Dist. LEXIS 9755* (N.D. Texas, 2002) *adopted* 2002 U.S. Dist. LEXIS 1365 (N.D. Texas, 2002). In *Finelli*, the plaintiff was terminated for violating the employer's sexual harassment policy because he allegedly sexually assaulted another flight attendant while off-duty during a flight layover. He grieved this disciplinary action, and the arbitrator upheld the airline's decision finding that Southwest Airlines had good cause to fire him. Mr. Finelli filed an action in the district court arguing that because the conduct took place outside of the workplace it was not covered by the collective bargaining agreement. *Id.* at * 7.

The court affirmed the arbitrator's findings which held that:

> The grievant's behavior cannot be excused or overlooked because it occurred off the clock and away from Company property. In general, the employer had no right to control employees when they are not on the clock and on the property.

(Cont'd)
harassment occurring outside employer's premises arises out of the employment relationship between the claimant and the employer, therefore, exclusion provision in employer's general liability insurance policy for intentional acts which occur within company's employ is applicable).

In light of these rulings, it is significant to note that the Second Circuit affirmed the dismissal of Respondents' common law negligence claims, holding that exclusive remedy provisions of New York's Workers' Compensation statute precluded these claims in New York. (App. 17a). The basis for that ruling was that Ferris's attack had arisen out of her employment with Delta. (*Id.*).

> However, an exception to the general rule holds when there is a nexus, a relationship, between the errant conduct and the employer's business . . . Off-duty conduct is relevant when the conduct relates to and harms the employer's business.
>
> [I]n a situation where Flight Attendants not only work closely together while on duty, but often eat meals together when off duty, in part as a safety precaution when away from home, the Company has an obligation to ensure as best it can that Flight Attendants are not subjected to improper behavior by fellow employees. Thus nexus clearly exists in this case.
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> *Id.* at * 7-8.

As in the case at bar, Ferris was on a layover in Rome for the benefit of Delta, and consequently, there was a nexus between her socializing with Young and Petitioner's business.

2. The Second Circuit Held That The Evidence In This Case Was Sufficient To Impute Responsibility To Delta For Young's Conduct.

To determine whether Delta was liable for Young's rape of Ferris, the Second Circuit applied this Court's ruling in *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998) (noting agreement among the circuits), which holds that an employer is negligent with respect to sexual harassment if it knew about the harasser's unlawful conduct but failed to take action to stop it. *Id.* 524 U.S. at 799-800, 118 S. Ct. at 2289. (App. 14a). The Second Circuit held that "(g)iven all the circumstances, a reasonable fact finder could

find that Delta was negligent in failing to take steps that might have protected Ferris from Young's proclivity to rape female co-workers." (App. 15a.).

The Second Circuit correctly held that the fact that Ballweg and Feingold were raped while off-duty did not "absolve Delta of all responsibility" to take action in response to those complaints. (App. 16a). The Second Circuit did not delve into the factual scenarios surrounding the sexual assaults of both Ballweg and Feingold. The record, below, however, indicates that although both were raped in a location which was less closely tied to Delta's workplace than a layover hotel, each encountered subsequent problems with Young which further connected this harassment to Delta's work environment. *See* pp. 4-6, *supra.* This conduct was exacerbated by Young's intimidation of both women after the rapes occurred, and their continuing fear of encountering him again in the work place. *See, e.g., Bowers v. Radiological Society of North America, Inc.*, 101 F. Supp. 2d 691, 693 (N.D. Ill. 2000) (off-duty harassment which occurred in a private home was actionable where consequences of that conduct impacted work experience of the victim); *Aldridge v. State of Kansas*, 1997 U.S. Dist. LEXIS 15472 * 24 (D. Kansas 1997) (conduct outside workplace may be relevant to hostile work environment claim).

In addition, both Ballweg and Feingold came forward and placed Delta on notice of Young's "method of operation," and told Delta's management that they were concerned about the safety of other Delta Flight Attendants who unknowingly might place themselves in close quarters with Young. *Supra* at pp. 4-6. The work-related context of the harassment that both Ballweg and Feingold endured at the hands of Young, as well as their stated concerns predicting future danger for

other female Delta Flight Attendants, more than sufficiently raises a fact issue as to whether Delta failed to respond to known complaints of prior work place co-worker sexual harassment.[12]

Had these prior complaints been even partially credited by Delta management, it should have alarmed the airline. Instead, Petitioner's supervisory staff treated this information as inconsequential, even causing one Supervisor Ruhl to affirmatively refuse to file a written report (App. 16a), and subsequently another, Kathy Goldberger, to refuse to take any action because there was no prior documentation about Young's unlawful conduct. (JA-888: ¶ 22-23).

3. The Second Circuit's Decision is Not in Conflict With Other Circuit Court Decisions Defining The Scope of Employer Liability For Co-Worker Harassment.

Delta misrepresents that the Second Circuit's decision is in conflict with decisions from other Circuits, and that for this reason this Court should grant the Petition. Delta cites two Circuit Court of Appeals decisions, one an unpublished decision from the Tenth Circuit (with no precedential weight in that circuit), the other from the Sixth Circuit, and two district court decisions from the Seventh Circuit. Delta also cites a State Appellate Court decision from California. Not one of these decisions holds, as Delta suggests, that as a blanket rule, an employee who is assaulted while off-duty by a co-worker cannot maintain a Title VII claim against her employer.

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12. With regard to Young's harassment of Zachry, Delta cannot refute that most of Young's unwelcome advances, and intimidating conduct clearly took place in places which are part of its workplace: a Delta airplane, a Delta tram, and the airport tarmac while on duty. (App. 9a-10a).

For instance, in *Anderson v. Adam's Mark Hotels & Resorts*, 211 F. 3d 1277, 2000 U.S. App. LEXIS 15136 (10th Cir. 2000) (an unpublished decision), the Tenth Circuit did not hold that the plaintiff was barred from bringing a Title VII action against the hotel because the rape occurred after hours (although in the hotel itself, where apparently, plaintiff's co-worker had a room). Rather, the Tenth Circuit held that the Adam's Mark could not be held liable for the rape for two reasons which are distinguishable on the facts in the present case. First, because it was not foreseeable to the Adam's Mark that two of its employees would randomly socialize after work. *Id.* at * 6. In that employment situation, once employees left for the day, there was no predictable location that they might gather. That scenario is obviously contrasted to a flight layover situation where predictably Delta's Flight Attendants would congregate. Moreover, even in a situation far more remote in place than the layover, the after work social life of employees, the Tenth Circuit examined whether the hotel was on notice of any prior complaints which should have alerted the Adam's Mark that a co-worker presented a possible danger to its workforce. *Id.* at * 6-7. Clearly, in the case at bar, there were numerous reports which properly put Delta on notice.[13]

Similarly, in *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F. 3d 1344 , 1353-1354 (7th Cir. 1995), the Seventh Circuit did not hold that because the sexual harassment of the plaintiff took place at a striptease bar and at a lounge,

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13. Although there were allegations in this case that the hotel had received three prior reports concerning sexual harassment, these complaints pertained to the plaintiff's attacker attempting to date employees. Complaints about that type of misconduct could not fairly place the employer on notice that one of its employees might rape a co-worker. *Id.* at **1.

both undisputedly off-site and off-duty, that it was as a matter of law not actionable under Title VII. In fact, that court assumed that the alleged conduct, which was considerably less serious than the drugging and rape of Ferris, was actionable. A determination was made that plaintiff could not bring a Title VII claim against the company solely on the basis that the harasser's actions did not rise to the level of a hostile work environment. *Id.* There is no dispute in this case that the events pertaining to Ferris constitute a hostile work environment.

In addition, neither district court decision cited by Petitioner demonstrates a conflict in the Seventh Circuit with the Second Circuit's decision. In *Alvey v. Rayovac Corporation*, 922 F. Supp. 1315, 1329-1331 (W.D. WI. 1996), the district court granted the employer's motion for judgement as a matter of law because it found that she could not prove that the alleged conduct rose to the level of a hostile work environment and not because off-duty incidents, in and of themselves, could not be work-related. Moreover, *Alvey*, did not involve any sexual assaults against the plaintiff.

In *Hunter v. Countryside Association For The Handicapped, Inc.*, 723 F. Supp. 1277, 1278 (E.D. Ill. 1989), the district court held that the plaintiff could not maintain a Title VII claim against the employer for an off-duty rape because there was no evidentiary nexus to the workplace. That court specifically recognized that had there been evidence of prior complaints of harassment by Hunter, or another employee, the court would have assessed whether a further assault was reasonably foreseeable. *Id.* at 1278-79.

Even in *Capitol City Foods, Inc. v. The Superior Court* of Sacramento County, 5 Cal. App. 4th 1042, 7 Cal, Rptr, 2d 418 (1992), *review denied*, 1992 Cal. LEXIS 3655 (Cal. Supr.

Ct., July 16, 1992), which is of limited precedential weight to this Court, the California Appellate court recognized that the "harassing conduct need not occur in the workplace." 5 Cal. App. 4th at 1048. It only must occur in a "work-related context." *Id.* That court held that under California law, an employer may be liable for sexual harassment for social pursuits after work on the premises if the activity was *expressly or impliedly permitted* and the activity was conceivable of *some benefit to the employer* or was a *customary incident of the employment relationship.* 5 Cal. App. 4th at 1049. Clearly, ensuring that flight attendants comply with federal regulations regarding layovers and ensuring that they are rested in order to be able to service the next leg of a flight is of critical importance to Delta's business of flying planes.

4. The Second Circuit Did Not Hold That Employers Have a Duty To Monitor The Off-Duty Consensual Activities Of Its Employees.

Delta disingenuously argues that the Second Circuit's decision establishes a new, and higher standard for employer liability under Title VII. Petitioner claims that standard would force Delta, and other employers, to monitor off-duty conduct between its flight attendants, not just in layover hotels, but in the private bedrooms of their employees' homes. Delta argues that such a requirement would be impossible to meet, and at the same time would violate the privacy rights of its employees. (Petition p. 20).

Delta's interpretation of the Second Circuit's decision is wrong. The Second Circuit decision does not require that Delta intervene in the personal lives of its employees while off-duty, or specifically that Delta should bear legal

responsibility for failing to have monitored the voluntary conduct of either Ferris or Young while they were staying at the Savoy. An employer does not face liability for its failure to be an omniscient presence in its workplace, but for its negligence or recklessness in failing to discipline or fire one of its employees when it becomes known that this employee presents a possible future danger to its workforce; in other words for its failure to intervene to prevent further sexual assaults. *See* e.g., *Hollins v. Delta Air Lines, Inc.*, 238 F. 3d 1255, 1258 (10th Cir. 2001).

Neither does the fact that Ferris chose to enter Young's room — thereby making it a voluntary act — alter the analysis the Second Circuit correctly applied. Title VII does not require female employees to assume the risk of workplace violence when an employer has prior knowledge of such a danger . Once Delta knew that Young presented a risk of danger to its female employees it was charged under Title VII to take prompt and remedial action to remedy this known danger and to prevent future harm to other potential victims. *Hirase-Doi v. U.S. West Communications, Inc.*, 61 F.3d 777, 781 (10th Cir. 1995) (evidence of harassment of other women raises issue of material fact as to whether employer knew or should have known about harasser's prior conduct); *Paroline v. Unisys Corporation*, 879 F. 2d 100, 107 (4th Cir. 1989), *vacated* in part on different grounds, 900 F. 2d 27 (4th Cir. 1990). (Employer's knowledge about the harassment of other female employees highly relevant to the issue of whether employer should have reasonably anticipated that the harasser would repeat his conduct.) *See* also *Roderick v. New Hampshire Hospital*, 2000 U.S. Dist. LEXIS 1143 * 27 (D.N.H. 2000); *Munn v. The Mayor and Alderman of The City of Savannah*, 906 F. Supp. 1577, 1584 (S.D. Ga. 1995).

Delta's argument that because only *some* flight attendants *may* socialize together (Petition p. 11) it cannot be held responsible for any future harm perpetuated against its female work force by Young after being placed on notice of his propensity to rape flight attendants is both incorrect and misleading. Under applicable standards for determining employer negligence in Title VII co-worker sexual harassment cases, common law concepts of reasonable foreseeability and proximate cause should guide federal courts in determining the scope of an employer's responsibilities. *Hirase-Doi*, 61 F. 3d at 783. Title VII does not require an employer to predict with absolute certainty which of its employees in its workforce will be harmed if it does not take steps to curtail the dangerous conduct of a known perpetrator. It only requires that an employer assume the risk of a known danger in its workforce, here, Young, to the extent that the employer, Delta, can reasonably anticipate that such danger will repeat itself. *See*, e.g. *Hirase-Doi*, 61 F. 3d at 784 (*citing* Restatement (Second) of Agency 213, comment d, addressing dangerous employees). *See* also, *Armstrong v. Burlington Northern Railroad Co.*, 139 F. 3d 1277, 1279 (9th Cir. 1998): "[T]est of foreseeability does not require that the negligent person should have been able to foresee the injury in the precise form in which it in fact occurred. Rather it is sufficient if the negligent person might reasonably have foreseen that an injury *might* occur." (Emphasis added.) (Citations omitted.) This obligation is equally applicable, whether the workplace consists of one large office building, or a more expanded environment such as the one Delta Flight Attendants find themselves working in by virtue of the itinerant nature of the work.[14]

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14. Delta would not be able to successfully argue, if the facts were slightly different in this case, that had Young attacked a flight

(Cont'd)

Moreover, Title VII does not require that Delta take steps to ensure with absolute certainty that it eliminates the likelihood of a known harasser, such as Young, from harming one of its female employees in the future. The employer's legal duty is discharged if it takes reasonable steps to discover and rectify acts of sexual harassment of its employees and prevent the harasser from harming other employees. *Baskerville v. Culligan International Company*, 50 F. 3d 428, 432 (7th Cir. 1995):

> What is reasonable depends on the gravity of the harassment. Just as in conventional tort law a potential injurer is required to take more care, other things being equal, to prevent catastrophic accidents than to prevent minor ones, so an employer is required to take more care, other things being equal, to protect its female employees from serious sexual harassment than to protect them from trivial harassment.

Id. (Citations omitted.) In accordance with these principles, the Second Circuit held that the duty of care Delta should have been held to was proportionate to the seriousness of the harm. (App. 15a).The court noted that Delta might have been held to a lesser standard of care had the reports of

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(Cont'd)
attendant in the back of an airplane, in one of its airport trams, or in a Delta Flight Attendant lounge that it would not be negligent for failing to respond to prior reports concerning Young's violent actions. Just as in this case, the probability that Young would attack any one flight attendant at any particular time cannot be predicted. Those flight attendants scheduled to fly with Young, however, would obviously be highly probable targets. Similarly, those same flight attendants, who after disembarking a Delta aircraft would stay in the same layover hotel as Young in a foreign city, would likely be future victims of an attack by Young.

Young's off-duty conduct prior to Ferris's sexual attack referred to "flirtation, sexual innuendo, or crude talk," as opposed to the "more serious threat" which the prior reports in this case alerted Delta about: the serious crime of rape. (App. 15a).

In the case at bar, what would have been a reasonable response by Delta to prior complaints about Young's dangerous conduct was never an issue. It is *undisputed* that Petitioner never took *any* action in response to the reports from three Delta Flight Attendants. (App. 7a, 9a-10a). While Title VII does not require that an employer "use the most serious sanction available to punish an offender", *Landsgraf v. USI Film Products*, 968 F. 2d 427, 430 (5th Cir. 1992), *aff'd* 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994), a reasonable jury could certainly conclude that by the time Delta had received two reports that Young had raped two different Delta Flight Attendants, Young should have been fired. *See*, e.g., *Baskerville*, 50 F. 3d at 432 (reasonable for employer to fire harasser "on the spot" had he assaulted even one employee). If Young had not been employed by Delta on March 16, 1998, he would not have flown a Delta flight with Ferris to Rome, where they both worked in the same cabin. If Young had not been part of Ferris's flight crew, and she had met him at the Savoy, she would not have casually joined a stranger for lunch in his hotel room. Therefore, had Young been removed from the workplace, Ferris would never have been drugged or raped.

The Second Circuit decision does not establish a new legal precedent for employer liability. It merely affirms this Court's admonition that Title VII's "primary objective is not to provide redress for [harassed employees], but to avoid the harm" in the first place. *See Faragher*, 524 U.S. at 805-806,

118 S. Ct. at 2292 (*citing Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417, 95 S. Ct. 2362, 2371, 45 L. Ed. 2d 280 (1975)). The Second Circuit applied this objective to the special circumstances pertaining to airline employees, and the grave nature of the sexual harassment in this case, violent sexual acts against its female flight attendants.

Delta strenuously objects to what it erroneously claims the Second Circuit is mandating: too much intervention in the lives of its co-workers. In reality, this case is simply about how little Delta did to prevent the brutal rape of Ferris by Young. Was some response to the prior complaints really too much to expect? Although Delta did not fire Young from his employment, after Ferris reported his conduct, (but permitted him to resign because he stopped cooperating with the investigators) (App. 6a), he is now gone from Delta's workforce. Because Young is no longer employed by Delta, other female Delta Flight Attendants are spared from encountering Young through their employment for Delta and erroneously putting their trust in him because he was a fellow flight attendant, even to the extent of allowing themselves to be in close proximity to Young behind closed doors. This case is solely then about Delta's failure to act. The Second Circuit understood this, and its decision is fully in accordance with well established principles developed under Title VII law.

CONCLUSION

For the reasons stated above, the writ of *certiorari* should be denied.

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No. 01-1829

Supreme Court, U.S.
FILED
SEP 17 2002
CLERK

IN THE

Supreme Court of the United States

DELTA AIR LINES, INC.,

Petitioner,

—v.—

PENNY FERRIS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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8 pp

TABLE OF CONTENTS

	PAGE
ARGUMENT	1
CONCLUSION	6

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Whatever else might be said about the Second Circuit's decision in this case, one thing is certain. The court has *not* simply engaged in a logical expansion of prior Title VII precedent. It has, instead, significantly expanded hostile work environment law under Title VII and put employers on notice that they need to monitor and investigate the off-duty personal conduct of their employees to avoid Title VII liability. It also has put employees on notice that they must subordinate substantial zones of their personal privacy to the investigatory needs of their employers at the risk of summary termination of their employment should they fail to do so.

The Second Circuit has created these results by holding that employers can be liable for sexual harassment *under Title VII* for the off-duty actions of their non-supervisory employees, *even in the absence of any sexual conduct in the workplace*. More specifically, the Court has held that Delta may be liable for actions that its Flight Attendant, Michael Young, allegedly took while drinking wine in his personal hotel room during a purely social visit with his co-worker Penny Ferris. Delta's responsibility, according to the court, stems solely from its alleged failure to investigate reports of alleged assaults that Mr. Young may have committed several years before while he was engaged in purely social activities in his own home and in a private hotel room far from any city to which Delta flies. In other words, Delta is potentially liable under Title VII—an employment discrimination statute—despite the indisputable fact that Mr. Young *never* did *anything* sexually

inappropriate in the workplace.[1] No Court has ever adopted such a principle, or anything close to it.

Delta has previously demonstrated in its Petition for Certiorari that Mr. Young's private layover hotel room—which Ms. Ferris admittedly entered to eat and drink alcohol with him for purely social reasons wholly unrelated to Delta—was not part of her work environment for purposes of Title VII.[2] The Second Circuit held, how-

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[1] The closest Plaintiff comes to an allegation of inappropriate sexual conduct in the workplace is her claim that Mr. Young sent "threatening e-mail messages, using Delta's e-mail system" to Aileen Cori Feingold. (Respondent's Brief, p. 5) In fact, however, it is undisputed that the e-mail messages were both non-sexual and non-threatening. Ms. Feingold could not identify anything that was even remotely "sexual" in the workplace e-mails, and the "threatening" aspects of the e-mail, according to Mr. Feingold, was the use of language that Ms. Feingold found "weird" (like the phrase "talking smack").

Plaintiff also alleges, without support, that Mr. Young engaged in sexual harassment of another Flight Attendant, Michelle Zachry, in the workplace. (Respondent's Brief, p. 7) But the only thing that Mr. Young did with respect to Ms. Zachry in the workplace was twice yell at her in an "intimidating" fashion (primarily because she was gossiping about him) and said that he was going to "get her" if she continued to talk about him.

[2] Plaintiff disputes this in her Brief in Opposition, and argues that "[t]he Second Circuit correctly defined Delta's work environment to include those locations that the airline could reasonably foresee that its flight attendants would congregate in." (Respondent's Brief, p. 12) This argument itself demonstrates the breathtaking sweep of the Second Circuit's decision. If Plaintiff and the Second Circuit are correct that a "workplace" under Title VII is defined by the "forseeability of gathering," employers now will be liable for conduct by non-supervisors that occurs in a host of non-work related locations. It is certainly foreseeable that employees will gather in restaurants, bars and even each other's homes. Nevertheless, no Court ever has held that an employer is liable for non-supervisory conduct that occurs in a location that the employer cannot even enter, much less meaningfully control. And certainly no Court (until, apparently, the Second Circuit) has

ever, that not only was this private social encounter a part of Ms. Ferris' work environment, but that Delta may be held liable for Mr. Young's actions in the hotel room *despite the fact that it was indisputably the first alleged sexual misconduct by Mr. Young that ever occurred anywhere near a Delta work environment.* Delta is potentially liable, according to the Second Circuit, because it did not investigate and monitor Mr. Young's previous, off-duty dating behavior.

Holding Delta, or any employer, liable simply because it did not investigate reports of an employee's alleged off-duty sexual misconduct dramatically expands the reach of Title VII.[3] It fundamentally alters the widely recognized "general proposition," cited by Judge Weinstein in the District Court, that "employers are not responsible under Title VII for hostile sexual acts resulting from non-work-related, off-duty interactions between

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ever held employers liable for failing to address non-supervisory social conduct that occurred in an employee's private home or private bedroom.

[3] Plaintiff argues in her Brief in Opposition Delta has misrepresented the alleged off-duty misconduct of Mr. Young as it relates to Kathleen Ballweg and Aileen Feingold, and that each of these women testified to an unequivocal rape by Mr. Young. (Brief in Opposition, p. 3) This is incorrect. Delta's description of the record was both accurate and precise. The bottom line is that, in Ms. Ballweg's case, she consensually shared a bed with Mr. Young and (at least initially) did not resist his advances. In Ms. Feingold's case, she consensually went to sleep in Mr. Young's bed, and when he made physical advances toward her, she made no physical objections, and the only verbal objection she made was that she was not interested in playing "this game."

Despite these descriptions by Ms. Ballweg and Ms. Feingold, Plaintiff would hold Delta liable in this case for not fully investigating these ambiguous, off-duty, off-premises encounters and disciplining or terminating Mr. Young despite his certain protestations of innocence.

co-employees." (*Id.* at 29a) It also turns the nation's primary *employment discrimination* statute into a general tort liability law, under which employers have a duty to investigate any allegations of private sexual improprieties (including, presumably, allegations of spousal abuse, or, as in this case, date rape) no matter how far removed the reported incident is from the workplace. The imposition of these duties constitutes an unprecedented expansion of Title VII, and one of significant importance to employers and employees alike.[4]

Ms. Ferris herself implicitly acknowledges that the Second Circuit essentially has re-invented Title VII. According to her Brief in Opposition, the court's interpretation of Title VII requires that:

> Once Delta knew that Young presented a risk of danger to its female employees it was charged under Title VII to take prompt and remedial action to remedy this known danger and to prevent future harm to other potential victims.

(Brief in Opposition, p. 22) Until now, employers' obligations under Title VII have been to identify and eliminate sex discrimination in the workplace, not to comprehensively protect female employees from danger or harm, and not to compensate them for all dangers that might befall them from co-workers, customers or other members of the general public. If Title VII now imposes this parental-like general obligation to safeguard female

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[4] To state the obvious, under the Second Circuit's reading of the law, Delta is now required to investigate and take action any time there is a complaint about a private date between any two of its tens-of-thousands of employees and to take some undefined action against the accused employee if there is even a question about the propriety of the employee's behavior during the date. The time, energy and money that this obligation requires easily could exceed that required for all of Delta's other Human Resources functions.

employees inside and outside the workplace, it carries with it, in the words of Judge Weinstein, "unacceptable inquisitorial snooping and intrusiveness by employers into the private lives of their employees, contrary to fundamental American notions of privacy." (*Id.* at 22a) The Second Circuit's decision, simply put, fundamentally alters the employer-employee relationship by opening the private sexual conduct of employees to regulation, inquiry and investigation by their employers.

Finally, Ms. Ferris suggests that, even if Title VII *has* been expanded here (and there really can be no doubt on this point), the expansion turns on a unique set of circumstances peculiar to the airline industry and to the circumstances surrounding international layovers. As is evident from the discussion above, however, this assertion simply is wrong. It is quite common in *all* industries for non-supervisory employees to "frolic and detour" into social engagements, not only while they are away from home on the business of their employer, but also when they are working in their home cities and towns. Whether in layover hotel beds, or in airport bars, after hours drinking establishments, or private homes, the Second Circuit's decision effectively stretches the umbrella of Title VII over all "foreseeable" personal frolics and detours. The notion that employers are now responsible for monitoring the private lives of their employees in such contexts is of significant importance to *all* employers (and all employees as well), not just employers in the airline industry.

Notwithstanding, Ms. Ferris' illogical attempts to downplay the decision as airline-specific, the Second Circuit's holding—that Delta may be liable for an alleged assault on Ms. Ferris solely because Michael Young had been alleged to have behaved inappropriately

on previous dates in private quarters several years earlier—changes the purpose and dramatically expands the scope of Title VII. Review by this Court is necessary to preserve the proper focus of the Act, to eliminate the manifest risk to personal privacy that the decision creates, and to resolve a split in the circuits on the issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

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